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No. 86-776

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

U S WEST, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA

and

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

This case arises out of the divestiture of the American Telephone and Telegraph Company. Despite the complexity of the AT&T divestiture, this proceeding essentially involves a pure question of law. Petitioner does not seek to undo divestiture, nor to recreate the Bell System. Rather, this petition questions the propriety of injunctive restrictions agreed to by AT&T during the divestiture proceeding, which severely restricted the business activities of its divested subsidiaries after the legal relationship between parent and subsidiary ceased to exist. These restrictions were imposed upon the divested operating companies who were not parties to the lawsuit, who were not parties to the consent decree which terminated that lawsuit, and whose interests were unrepresented in the judicial proceeding culminating in the divestiture decree. The issues for review by this Court are as follows:

1. Whether a sole shareholder of a corporation may bind its subsidiary corporation to a prospective injunction severely restricting its business activities after divestiture, without having assumed any fiduciary responsibility for the interests of said subsidiary.
2. Whether a sole shareholder of a corporation which divests its entire ownership of a non-party subsidiary corporation in a judicial proceeding may bind the operations of the subsidiary after divestiture, when it expressly disclaims any responsibility to represent the interests of the subsidiary, and when the parent was prevented by a patent conflict of interest from properly representing the interests of the subsidiary.
3. Whether the lower court's treatment of these issues is consistent with express pronouncements of this Court concerning the requirements of the Due Process Clause of the Constitution.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following parties participated in the proceeding before the United States Court of Appeals for the District of Columbia Circuit: Bell Atlantic Corporation; Pacific Telesis Group; MCI Communications Corporation; Radio Common Carrier Division of Telocator Network of America; Southwestern Bell Corporation; American Information Technologies Corporation; BellSouth Corporation; NYNEX Corporation; and National Association of Regulatory Utility Commissioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

U S WEST, Inc. ("U S WEST") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 15, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A)[1] has been reported sub. nom. *United States v. Western Elec. Co., Inc.* at 797 F.2d 1082 (D.C. Cir. 1986). The decision of the United States District Court for the District

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[1] Citations to "App." refer to appendices to this petition.

of Columbia (App. B) is reported sub. nom. *United States v. Western Elec. Co.* at 627 F. Supp. 1090 (D.D.C. 1986).

JURISDICTION

The judgment of the Court of Appeals was August 15, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are set forth in Appendix E and include the Due Process Clause of the United States Constitution, Section 2 of the Sherman Act[2] and Section 16(b)-(h) of the Antitrust Procedures and Penalties Act—commonly known as the "Tunney Act."[3]

STATEMENT[4]

On January 1, 1984, American Telephone and Telegraph Company ("AT&T") divested itself of the stock of its twenty-two operating telephone companies ("BOCs" or "operating companies"), terminating a ten year old antitrust suit brought by the Department of Justice ("Department"). This divestiture, approved by the United States District Court for the District of Columbia,[5] resulted in the transfer of the operating companies' stock to seven newly incorporated holding companies.

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[2] 15 U.S.C. § 2.

[3] 15 U.S.C. § 16(b)-(h).

[4] This Statement is limited to the facts relevant to this petition. It does not attempt to provide a complete description of the litigation surrounding the formulation and enforcement of the consent decree.

[5] *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 222-26 (D.D.C. 1982) (*"MFJ Opinion"*).

Petitioner U S WEST is one of the holding companies, and owns all of the stock of three operating companies.[6]

This petition for certiorari addresses the propriety under the Due Process Clause of allowing AT&T to represent and bind the divested BOCs to a prospective injunction restricting otherwise legitimate business activities, given its patent conflict of interest with the BOCs. This conflict was dramatized by statements of AT&T's counsel during the District Court proceeding which led to entry of the 1982 consent decree:

> the biggest concern of [AT&T] was the consent decree of 1956. We cannot live with that decree. Cannot. The technology of telecommunications has so merged with the technology of data processing that *if we end up with the 1956 consent decree we are a withering corporation waiting for its demise and nothing more.* And I read to Your Honor a letter which we never did put in the record, but would have . . . before the case ended, from a Government lawyer . . . *unless you get out of that consent decree* [*you will be the*] *Penn Central of the '90's, you are dead.* I mean, there is no business, no live, viable business that you can be in. You must get rid of the consent decree.[7]

The restrictions contained in the 1956 consent decree (plus other more burdensome limitations)[8] were subsequently imposed on the divested BOCs as part of AT&T's

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[6] These companies are The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company, which provide telephone services to fourteen western and midwestern states.

[7] *United States v. American Telephone and Telegraph Co.*, 1982-1 Trade Cas. (CCH) ¶ 64,465 at 72,607 (D.D.C. 1982) (emphasis added).

[8] In addition to the 1956 restrictions limiting business activities to common carrier communications services, the new decree, unlike its predecessor, prohibited the BOCs from engaging in manufacturing and the provision of information and interexchange (*e.g.*, long-distance) services.

negotiated settlement of the lawsuit. While AT&T agreed to restrictions insulating it from BOC competition, the resulting settlement left it free to compete with the operating companies.

A. The MFJ Litigation

In 1974 the Department commenced an action against AT&T contending that AT&T was using objectionable means, in violation of Section 2 of the Sherman Act,[9] to thwart competition in the telecommunications equipment and private intercity telephone service markets.[10] The complaint sought the divestiture of Western Electric and Bell Laboratories and, accordingly, the suit named only AT&T, Western Electric and Bell Laboratories as party-defendants. The Department never joined the operating companies as defendants, even after it decided to seek their divestiture rather than Western Electric and Bell Laboratories.

On January 8, 1982, before AT&T had completed its case, the Department and AT&T jointly announced that they were settling the case by entry of a consent decree. The proposed decree lifted the restraints imposed on AT&T by an earlier antitrust consent decree entered in 1956.[11] It required AT&T to divest its operating telephone companies, and proposed that the operating companies be enjoined from any business activity other than those which were defined as "exchange access," "information access" or "exchange telecommunications." Under the proposed decree, AT&T would be free to enter any

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[9] 15 U.S.C. § 2.

[10] *United States v. American Tel. and Tel. Co.*, No. 74-1698, Complaint (D.D.C., filed Nov. 20, 1974).

[11] *See United States v. Western Electric Co., Inc.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956). The 1956 consent decree settled an antitrust case brought against AT&T and Western Electric in 1949 relating to alleged monopolization of the telephone equipment market.

business—including exchange telecommunications services directly competitive with the to-be-divested BOCs—while the latter were barred from engaging in any businesses except those limited activities set forth in the proposed decree. The BOCs were to be prohibited from competing with virtually all of AT&T's post-divestiture businesses. The operating companies did not participate in the negotiation of the proposed decree.

After the settlement was announced, the District Court initiated public notice and comment proceedings on the settlement, utilizing the procedures established in the Antitrust Procedures and Penalties Act.[12]

At the inception of the Tunney Act-like proceedings, a number of commenting parties, including the States of California, Michigan, Missouri, and Oregon, argued that some mechanism needed to be established to protect the post-divestiture interests of the non-party operating companies. Observing that the interests of AT&T were diametrically opposed to those of the to-be-divested operating companies, including the proposed injunction against lawful business activities, these parties suggested a variety of means whereby the legal rights of the operating companies might be protected.[13] All such suggestions were vigorously opposed by AT&T and the Department.

In a May 25, 1982 memorandum, the District Court requested comments on the status of the BOCs in the

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[12] 15 U.S.C. § 16(b)-(h). There was a question raised as to whether the Tunney Act applied because the proposed settlement involved a modification of the 1956 decree. AT&T and the Department stipulated to the use of such procedures by the District Court thus rendering the issue moot. *MFJ Opinion*, 552 F. Supp. at 214-17. Therefore, petitioner will refer to the public proceedings held by the District Court as "Tunney Act-like."

[13] For example, it was suggested that the Court could insure proper representation either by divesting the operating telephone companies immediately or by appointing a guardian *ad litem*, or similar officer to represent their interests. *MFJ Opinion*, 552 F. Supp. at 220-22.

proceeding. AT&T filed its response on June 14, 1982, asserting that:

> AT&T and the current BOCs are all segments of a single enterprise owned by a body of shareholders whose interests in Bell System assets AT&T is duty-bound to protect. The Bell System thus speaks with a single voice on the only question presently pending before the Court: whether the Decree is in the public interest. There is no warrant for a separate BOC spokesman on that issue.* [14]

* So long as the BOCs are part of a single enterprise, they cannot by definition have interests divergent from the rest of the enterprise.

AT&T then noted that the BOCs would be entitled to separate representation when they became independent upon divestiture, at which time they would already be "entities bound by the Decree." [15]

These views were repeated by Howard Trienens, Esq., counsel for AT&T, at the Tunney Act-like hearings held on June 29 and 30, 1982. In response to comments by the Assistant Attorney General for the State of Michigan that the BOCs "are going to have their arms and legs cut off," and that it would thus be appropriate for the

[14] AT&T June 14, 1982 Brief in Response at 108.

[15] *Id.* at 109 (footnote omitted). This topic was again addressed by AT&T in a Reply Brief filed June 24, 1982, wherein it reiterated its position on the independent representation issue:

> A number of States also assert that if immediate divestiture of the BOCs is not ordered, separate representation of the BOCs is necessary because of alleged "conflicts of interest" between the BOCs and AT&T. [Footnote omitted.] As noted in AT&T's June 14 Brief (pp. 108-12), the only issue before the Court in this proceeding is whether entry of the Decree is in the public interest. On that issue the Bell System speaks with a single voice. By definition there cannot be a conflict of interest between various parts of the same enterprise.

AT&T June 24, 1982 Reply Brief at 124-25.

BOCs "to have a hand in their own destiny," [16] the following colloquy occurred:

> The Court: We're now talking about a different situation where they are going to be cast adrift and they are going to be, not through any fault of yours, but they are going to be on their own and *they may now—they presumably will 18 months down the road or two years down the road have different interests.*
>
> Mr. Trienens: That's correct.
>
> The Court: And the suggestion that these people are making is if they are going to have different interests shouldn't they have more input than simply being allowed to voice their views at a meeting with AT&T top management, with top management having the final decision-making power? Shouldn't they rather have some independent voice in this? That seems to be the issue and I'm not saying that you are wrong on it. But it doesn't do any good to sweep it under the rug.
>
> Mr. Trienens: We're not going to sweep it under the rug, we're going to face it right up to this idea of spinning them off intact. I want to say in the decision to sign this decree proposal by the Justice Department, the BOC's were again consulted. But again *it was AT&T's decision. If it's approved, they are committed to implementing it,* and the only question is whether the split ordered by the decree is a good idea in the public interest.[17]

On the more specific issue regarding the proposed business restrictions which would be imposed on the BOCs after they became independent entities, AT&T took the

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[16] Transcript of June 29, 1982 Hearing at 25219 ("Tr. at ——").

[17] *Id.* at 25232-25233 (emphasis added). The decree expressly precluded the operating companies from seeking modification of its terms until after divestiture. *Modification of Final Judgment,* Section VII, 552 F. Supp. at 231 ("*MFJ*" or "consent decree") (App. D).

position that it agreed to the line of business restrictions on the operating companies as "part of [its] bargain" with the Department of Justice.[18]

As noted, the Department likewise opposed independent representation for the BOCs, arguing essentially that the "interests of the state regulatory commissions . . . are closely aligned with . . . the divest[ed] BOCs" and therefore they could adequately represent these companies' views.[19] This was contrary to the stated position of the state commissions. In fact, as indicated above, the state commissions were the lead group calling for independent representation on behalf of the operating companies.

On August 11, 1982 the District Court issued its findings regarding the proposed consent decree.[20] AT&T was freed from the restraints contained in the 1956 consent decree while the proposed "line-of-business" restrictions, with several modifications insisted on by the District Court, were imposed on the operating companies.[21] The District Court rejected arguments advanced by a variety of regulatory agencies commenting in the Tunney Act-like proceedings, who had pointed out that the line of business restrictions were unnecessary because they duplicated existing jurisdiction granted by statute to federal and state regulatory authorities.[22] The *MFJ* also required AT&T to submit a Plan of Reorganization providing for the transfer of assets necessary to allow the

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[18] Tr. at 25211.

[19] *Id.* at 25242, 25245 (Statement of Ronald G. Carr, Esq., speaking on behalf of the Department).

[20] *See generally, MFJ Opinion*, 552 F. Supp. 131 (D.D.C. 1982).

[21] For instance, the District Court required that AT&T and the Department agree that the BOCs would be freed from any line of business restriction upon an evidentiary showing that there was "no substantial possibility that [they] could impede . . . competition in the [new] market." *MFJ Opinion*, 552 F. Supp. at 231.

[22] *Id.* at 187, n.229.

BOCs to function independently and the configuration of "exchange areas" which would define the boundaries within which the BOCs could operate.

With regard to the BOC representation issue, the District Court, while recognizing that AT&T had the incentive and ability to advance its own interests at the expense of those of the operating companies,[23] nevertheless concluded that "[*i*]*t is not at all clear* that AT&T will act contrary to the interests of the Operating Companies." [24] The District Court thus rejected the contention that the to-be-divested operating companies should be afforded independent representation, stating:

> Many persons and organizations have questioned the lack of independent representation for the Operating Companies in this proceeding, both prior to the entry of judgment and in conjunction with the preparation of the plan of reorganization. They contend that AT&T's interests under the proposed settlement are diametrically opposed to those of the Operating Companies, and that AT&T therefore cannot be relied upon to act in the Operating Companies' best interests. They suggest that, for these reasons, the Court should ensure the proper representation of the Operating Companies either by divesting them immediately or by appointing a guardian *ad litem* or similar officer to represent their interests. Such participation will not be ordered at this stage of the proceedings, both because it is not necessary, and, more fundamentally, because there is no practical means for effecting it.[25]

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[23] *Id.* at 214, n.345. The Court did, however, specify that, after completion of the Plan of Reorganization, the designated Chief Executive Officers of the Holding Companies would be required to submit statements "certifying that, to the best of their knowledge, the plan will leave the companies which they head as viable entities with the resources necessary to perform the functions described in the decree." *Id.* at 222. These submissions were filed after entry of the *MFJ* and were limited to resource issues (*e.g.*, personnel, equipment, etc.).

[24] *MFJ Opinion*, 552 F. Supp. at 220 (emphasis added) (App. C).

[25] *Id.*

In accordance with the modified decree, AT&T prepared and filed a Plan of Reorganization for court approval. The exchange boundaries and asset transfer proposals were approved by the District Court.[26]

Divestiture was effected on January 1, 1984. On this date, AT&T divested its ownership interest in the Bell System's exchange operations by distributing its stock in the operating companies to seven holding companies, including U S WEST. Shortly thereafter, AT&T commenced a variety of efforts utilizing the consent decree to prevent the operating companies (and their parents) from competing against it.[27]

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[26] *See United States v. Western Elec. Co., Inc.*, 569 F. Supp. 990, 1057 (D.D.C. 1983).

[27] For example, in September of 1984, U S WEST sought a waiver of Section VIII(C) of the MFJ (552 F. Supp. at 231) in order to provide financial services and engage in financing transactions on a nationwide, commercial basis. After the Department of Justice approved U S WEST's entry into the financial services business, AT&T objected to U S WEST's provision of said services to certain telecommunications equipment manufacturers. Ultimately, U S WEST was permitted by the District Court to enter the financial services business (after more than eight months delay), subject to the limitations proposed by AT&T.

In October of 1984, AT&T moved to compel Pacific Northwest Bell ("PNB") to comply with the *MFJ* regarding its private intrastate multi-LATA network connecting offices of the State of Oregon. AT&T alleged, among other things, that PNB was providing inter-LATA services to the State of Oregon in violation of Section II(D)(1) of the *MFJ*. 552 F. Supp. at 227. Additionally, AT&T, as a potential competitor of PNB for the provision of private network switching services, alleged that PNB discriminated against it in the provision of exchange access, in violation of Appendix B of the *MFJ*. 552 F. Supp. at 232-34. The District Court issued a Memorandum Order in June of 1985, rejecting AT&T's allegations.

In February of 1985, AT&T opposed BOC provision of what are commonly known as "shared tenant services" before the lower court in the instant proceeding.

B. Earlier Challenges To The Entrance Of The Decree

During the consent decree proceedings prior to divestiture, the District Court allowed certain parties to intervene for purposes of appealing the resulting *MFJ* and certified their appeals for immediate consideration by the Supreme Court under the Expediting Act.[28] Having been denied independent representation or party status, the operating companies were not able to join in the appeal of the *MFJ*—which was litigated prior to divestiture. In fact, the decere itself prohibited such action until after divestiture, and expressly precluded any independent action by the operating companies until divestiture had been effectuated.[29] Thus, the appeals addressed by this Court did not raise the question of AT&T's authority to bind the post-divestiture operations of the BOCs.

This Court affirmed[30] without opinion over the dissenting opinion of Chief Justice Rehnquist with whom then Chief Justice Burger and Justice White joined. The dissent argued that the case should have been set for oral argument on basically two grounds: (1) whether the District Court exceeded its authority under the Tunney Act in approving the decree based on the mistaken assumption that there had been a judicial finding that the antitrust laws had been violated; and (2) whether the District Court had jurisdiction to approve the settlement.

The first BOC challenge to the entrance of the *MFJ* occurred shortly after divestiture. On July 26, 1984, the District Court issued a decision on a variety of requests for authority to transact businesses not permitted by the *MFJ*.[31] In its ruling, the Court appeared to add four new

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[28] 15 U.S.C. § 29(b).

[29] *See MFJ*, Section VII, 552 F. Supp. at 231.

[30] *Maryland v. United States*, 460 U.S. 1001 (1983).

[31] *United States v. Western Elec. Co., Inc.*, 592 F. Supp. 846 (D.D.C. 1984).

conditions to the consent decree not found in the text itself. U S WEST appealed, asserting, among other things, that AT&T's representation of the operating companies during the consent decree process had been defective. The appeal was subsequently dismissed by the Court of Appeals based on a finding that the District Court order was not ripe for judicial review.[32] All of U S WEST's arguments were preserved by the Court despite the dismissal.[33]

C. The Decision Of The Court Of Appeals Under Review

Subsequently, U S WEST challenged a January 13, 1986 District Court Order which found, among other things, that U S WEST, as the shareholder of three operating companies, was also subject to the *MFJ*'s line of business restrictions.[34] On appeal, the Court of Appeals addressed directly the key issue of AT&T's authority to bind the lawful business operations of the operating companies, their shareholders and affiliates after effectuation of divestiture. The holdings of the lower court were as follows:

1. AT&T was able to lawfully bind the post-divestiture operations of the operating companies by its agreement to the consent decree.
2. U S WEST and other holding company shareholders of divested operating companies, plus other affiliates, were bound by the injunctive provisions of the consent decree.
3. The District Court had erroneously modified the consent decree by imposing geographic limits on the operating companies' provision of exchange telecommunications services.

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[32] *See United States v. Western Elec. Co., Inc.*, 777 F.2d 23 (D.C. Cir. 1985).

[33] *Id.* at 30-31.

[34] *United States v. Western Elec. Co.*, 627 F. Supp. 1090 (D.D.C. 1986) (App. B).

4. U S WEST did not have standing to appeal other aspects of the District Court's order because they involved matters raised by other companies and, thus U S WEST was not bound by those aspects of the decision.

Of these rulings, only the first is the subject of this petition (although the others obviously would be affected if the lower court's decision is reversed). On the issue which is addressed in this petition, the lower court, found, among other things, that:

> U S West's due process argument fails because it ignores the facts that AT&T was a party to the antitrust proceeding and both the RHCs and the BOCs were wholly owned subsidiaries of AT&T at the time the consent decree was entered. . . . Because the RHCs and BOCs were AT&T's privies in the antitrust proceeding, the consent decree is binding on the former AT&T subsidiaries even though they were not parties to the action.[35]

The lower court concluded that the only duty owed by AT&T during the consent decree process ran to its own stockholders. It also found that there was no separate duty running to the soon-to-be-divested companies, despite well-established case law to the contrary. The Court also found that the agreement by AT&T to the imposition of substantial competitive restrictions on the holding companies and BOCs amounted to a "mere[] allocati[on of] Bell System assets and liabilities among different portions of the business in anticipation of divestiture." [36] Thus, it ruled that AT&T's representation of the BOCs—even with regard to post-divestiture activities—would not be invalidated on conflict of interest grounds, even if AT&T's sole motive in agreeing to restrict the BOCs was to free itself.[37]

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[35] *United States v. Western Elec. Co., Inc.*, 797 F.2d 1082, 1087-88 (D.C. Cir. 1986) (App. A).

[36] *Id.* at 1088.

[37] *Id.*

REASONS FOR GRANTING THE WRIT

THE LOWER COURT IGNORED CONTROLLING PRECEDENT OF THIS COURT

In this proceeding, the lower court essentially reversed (or at least ignored) key decisions of this Court which have established fundamental fiduciary and due process requirements which govern whenever one entity undertakes to bind another in a court proceeding. By this Petition, U S WEST challenges the lawfulness of a prospective injunction dramatically limiting its lawful business operations (and the operations of its subsidiaries), which was imposed by a consent decree to which they never consented and which arose out of a lawsuit to which they were not parties. Most importantly, U S WEST challenges the lawfulness of a decree consented to on its behalf by a company which has expressly disavowed any duty to represent their separate interests—the very interests which were bound by the decree. U S WEST does not seek herein to reverse the AT&T divestiture. It seeks only to eliminate certain continuing injunctive restrictions which were unlawfully imposed.

In ruling that U S WEST and its subsidiaries could be bound under the *MFJ*'s injunctive provisions by AT&T's consent, the lower court expressly found that AT&T owed no duty to represent the interests of U S WEST and its subsidiaries when it undertook to bind their future operations. In fact, the lower court expressly found that "[e]ven if U S West is correct in asserting that AT&T agreed to restrictions on the RHCs and BOCs in order to free itself of restrictions," [38] such a conflict of interest was "irrelevant" to analysis of whether due process required representation of the BOCs' interests during the *MFJ* proceeding. Thus, the lower

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[38] *Id.*

court found that even self-dealing by AT&T would not invalidate its authority to represent and bind the BOCs.

In contrast, this Court has consistently held that an entity cannot be bound to the provisions of a consent decree in the absence of actual consent or proper representation.[39] This essential proposition derives from the basic notion that a consent decree is a contract enforceable as a judicial decree.[40] Neither the operating companies, nor any representative thereof, agreed to any provision of the consent decree. In fact, their participation in the *MFJ* proceeding was precluded by the District Court.

Based on due process considerations, this Court has also repeatedly recognized that an entity cannot be bound to a judicial decree (consent or litigated) unless its interests in the subject matter of the proceeding were adequately represented—especially when the bound entity was not a party to the litigation. It is a corollary to this principle that one who undertakes to represent the rights of another in a judicial proceeding assumes the role of a fiduciary, and thereby owes a greater duty to the entity whose interests are represented. These precepts are rooted in traditional notions of due process and form the predicate for valid class action suits,[41] proceedings involving associational representation,[42] and the concept of legal privity.[43]

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[39] *United States v. Ward Baking Co.*, 376 U.S. 327, 334 (1964).

[40] *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971).

[41] *Hansberry v. Lee*, 311 U.S. 32, 42-45 (1940).

[42] *Sam Fox Publishing Company v. United States*, 366 U.S. 683, 691-93 (1961).

[43] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969).

In this case, the lower court created an exception to these uniformly accepted principles which finds no support in American jurisprudence and is inconsistent with controlling decisions of this Court. The lower court essentially suspended the standard representation and fiduciary rules which ordinarily apply to all contracts and lawsuits (divestiture-related or otherwise) based solely on the fact that AT&T owned the stock of its soon-to-be-divested BOC subsidiaries during the consent decree proceedings. Paradoxically, the lower court recognized that these same rules would be in full force where divestiture of a recently acquired company is sought. The lower court also ruled that a corporate ownership relationship overrode the essential "community of interest" requirements which underpin the law of privity. In so finding, the lower court not only ignored the reality of the transaction under review but, more significantly, ignored controlling decisions of this Court which precluded the very exceptions postulated.

A. The Lower Court Effectively Overruled Fundamental Principles Of Fiduciary Law Enunciated By This Court

In the case at bar, it has been conceded that AT&T negotiated the consent decree and, in its capacity as sole shareholder of the subsidiary BOCs, agreed that these companies would be prohibited from engaging in otherwise lawful business operations *after* divestiture.[44] It is also undisputed that the operating companies were never made parties to the suit,[45] and that AT&T vigor-

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[44] AT&T Brief at 17-26.

[45] In fact, the divestiture lawsuit originally proposed restrictions on two AT&T subsidiaries—Western Electric Company, Inc. and Bell Telephone Laboratories and separately named these companies as parties to the lawsuit. For purposes of this appeal, however, AT&T is the sole relevant defendant. The naming of the two subsidiaries mentioned above as parties, while not so naming (or serving process upon) the operating companies does, however,

ously opposed all efforts to permit these operating companies to represent their own post-divestiture interests (or to obtain some other vehicle for fair representation not dominated by AT&T's own interests).[46]

In its initial brief to the lower court, U S WEST pointed out that the *MFJ* record and AT&T's own actions after divestiture demonstrated that AT&T had negotiated the *MFJ*'s injunctive provisions in a manner which advanced its own corporate interests at the expense of those of the BOCs. Indeed, AT&T had imposed line of business restrictions injurious to the BOCs in a manner which served AT&T's own post-divestiture interests and which protected AT&T from future competition by the operating companies. Under these circumstances, U S WEST argued that well-established principles of fiduciary law should have disqualified AT&T from serving as the BOC's representative in the consent decree process. Moreover, U S WEST postulated that the consent and participation requirements essential to enforcement of the line of business restrictions against the BOCs (after divestiture) were not fulfilled.[47]

In responding to U S WEST's initial brief, AT&T and the Department did not even attempt to argue that AT&T had properly fulfilled the fiduciary role which the law imposes on one who undertakes to bargain on behalf of another. To the contrary, AT&T and the Department contended that AT&T had no duty to represent the soon-to-be-divested operating companies because of AT&T's pre-divestiture stock ownership. For example, AT&T asserted:

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underscore an important omission by the Department of Justice in establishing *in personam* jurisdiction and party status with regard to the BOCs.

[46] *See* p. 5, n.13; 9, *supra*.

[47] See U S WEST Brief at 27-39.

> U S West's citations . . . that discuss the obligations of a fiduciary are beside the point . . .[48]. AT&T had no fiduciary obligations to the management of any one part of the unitary Bell System.[49]

Thus, AT&T and the Department argued that AT&T had no fiduciary duty in binding the BOCs to post-divestiture restrictions.

The lower court agreed with this basic proposition, and found that even self-dealing by AT&T would not have invalidated its representation of all parts of the Bell System during the consent decree proceeding:

> . . . [T]he only duty owed by AT&T was to its shareholders, who were identical to the initial RHC shareholders. *Even if U S West is correct in asserting that AT&T agreed to restrictions on the RHCs and BOCs in order to free itself of restrictions, there was nevertheless no injury* to the shareholders.[50]

Thus, the sole fact that AT&T owned the stock of the operating companies prior to divestiture was held to have two important consequences:

1. AT&T had, by virtue of such ownership, absolute dominion over and discretion to control (through agreement to consent decree restrictions) the post-divestiture operations of the operating companies.

2. AT&T was relieved of the duty to adhere to standard fiduciary principles in representing the

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[48] AT&T Brief at 22, n.**

[49] *Id.* at 22. See also Department of Justice Brief at 31-32. ("[I]n terms of fiduciary duty, there was only one duty owed: AT&T's duty to its shareholders.")

[50] 797 F.2d at 1088 (emphasis added). The lower court's assertion that AT&T's shareholders were identical to the initial Holding Company shareholders is incorrect. U S WEST's stock commenced public trading in November of 1983, prior to divestiture.

> severable interests of its to-be-divested operating company subsidiaries.

Such a result is inconsistent with decisions of this Court and basic notions of due process.

This Court has held that exercise of control over a subsidiary corporation by a stockholder creates, rather than eliminates, a fiduciary relationship. It has also expressly rejected the notion that a controlling shareholder may utilize such ownership as a shield to avoid the standard of fair dealing and representation which the law imposes upon one who acts on another's behalf. Thus, a controlling stockholder is normally held to an exacting standard of a fiduciary by virtue of the exercise of such control alone. In contrast with the lower court's finding, exercise of such control actually triggers a higher degree of fiduciary responsibilities.

These precepts were set forth in the landmark decision of *Pepper v. Litton*[51] in which this Court described the following "cardinal principles of equity jurisprudence":

> A director is a fiduciary. So is a dominant or controlling stockholder or group of stockholders. Their powers are powers in trust. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside. . . . [T]hat standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation . . . .[52] (Footnotes and cited case law omitted.)

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[51] 308 U.S. 295, 306 (1939).

[52] *Id.* at 306-7.

Thus, the proposition that a stockholder acts as a fiduciary *vis-a-vis* a controlled corporation is well-established.[53] Fiduciary duties are also recognized whenever a relationship results in one entity controlling and acting in the name of another.[54] This is particularly the case in court proceedings where the duty to avoid representation of conflicting interests is to be strictly observed.[55]

In this case, AT&T originally undertook to represent the post-divestiture interests of the operating companies before the District Court, entered into a consent decree severely restricting those same interests, and vigorously opposed suggestions that the operating companies should be afforded some mechanism to protect their post-divestiture rights. Under these circumstances, standard equitable principles required the appointment of a separate representative—or at the very least, recognition by AT&T that it owed a separate fiduciary duty to its soon-to-be-divested BOC subsidiaries.[56]

Thus, the lower court turned this Court's analysis in *Pepper v. Litton* on its head—finding that the very rela-

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[53] *Superintendent of Ins. of St. of N.Y. v. Bankers L. & C. Co.*, 404 U.S. 6, 12 (1971); *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510, 522 (1941); *Southern Pac. Co. v. Bogert*, 250 U.S. 483, 487-88 (1919).

[54] *Felix v. Patrick*, 145 U.S. 317, 321 (1892).

[55] See, e.g., *Wood v. Georgia*, 450 U.S. 261, 271 (1981) ("there is a . . . right to representation that is free from conflicts of interest").

[56] *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-330 (1981) ("To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.' . . . A fiduciary *cannot* contend 'that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.' ") (emphasis added).

tionship which normally imposes a fiduciary obligation on a parent corporation actually provided AT&T with an excuse not to represent the clearly separate interests of its BOCs. Because AT&T's express denial of any responsibility to represent the post-divestiture interests of the operating companies left those interests unrepresented, due process precluded application of the consent decree's injunctive provisions to these entities.[57]

B. The Lower Court Enunciated A New Standard Of "Privity" Inconsistent With Traditional Notions Of Due Process

The lower court's finding that the BOCs were lawfully bound by the *MFJ*'s post-divestiture restrictions on the basis of "privity" with AT&T similarly misconstrues the nature of the law of privity and its relationship with fundamental due process. The lower court ruled that the essential principles recognized by this Court in *Sam Fox Publishing Company v. United States*[58] and *Hansberry v. Lee*[59] were not applicable to AT&T or the operating companies because privity existed among these entities, due solely to the pre-divestiture wholly-owned subsidiary relationship.[60] Thus, the lower court found "no authority . . . for [U S WEST's] remarkable proposition that a parent may not bind its wholly owned subsidiaries

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[57] The lower court ruled that even if "AT&T [had] breached [a fiduciary duty to the operating companies], this would at most demonstrate that the RHCs have a cause of action against AT&T. It would not follow that the RHCs are entitled to judicial relief from the obligations of the consent decree." 797 F.2d at 1088. This assertion misapprehends U S WEST's position. The lower court did not find that AT&T endeavored to represent the post-divestiture interests of the operating companies, but did so poorly. Rather, the lower court found that AT&T had no duty to represent these interests at all.

[58] 366 U.S. 683.

[59] 311 U.S. 32.

[60] 797 F.2d at 1087-88.

without affording them independent legal representation," and ruled that: "[i]t is self-evident that due process does not require such representation." [61] The lower court thus found that AT&T could bind the BOCs to the injunctive provisions of the *MFJ* because they were in privity, yet held that this privity relationship did not include the duty to represent the separate post-divestiture interests of the BOCs. This ruling of the lower court misconstrues both the law of privity and U S WEST's position on its applicability to this proceeding.

The concept of legal privity, for purposes of enforcing a judgment, is predicated on the due process concept that a "non-party may be bound by a judgment if one of the parties to the earlier suit is so closely aligned with the non-party's interests as to be its virtual representative." [62] It is well-established that "the sound general rule is that the stockholder-corporation relationship does not of itself establish privity." [63] These concepts are rooted in the bedrock proposition that a non-party must be adequately represented by a privy before it can be bound by a judgment.[64]

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[61] *Id.* at 1088.

[62] *Mothers Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1572 (Fed. Cir. 1983), *citing Chicago, R. I. & P. Ry. Co. v. Schendel*, 270 U.S. 611, 618, 46 S. Ct. 420, 423, 70 L. Ed. 757 (1926); *Heckman v. United States*, 224 U.S. 413, 445-46, 32 S. Ct. 424, 434-35, 56 L. Ed. 820 (1912). *See also Aldrich v. Aldrich*, 378 U.S. 540, 543 (1964) (*per curiam*).

[63] *See* 1B J. Moore, J. Lucas & T. Currier Moore's Federal Practice, ¶ 0.411[10] at 478 (2d ed. 1984).

[64] This essential principle was emphasized in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, (1969), where a lower court had entered a judgment against a stockholder owning 100 percent of a defendant corporation on the basis of a stipulation by the subsidiary that the parent and subsidiary would be considered "one and the same corporation" for purposes of the lawsuit. Relying on such prior decisions as *Hansberry v. Lee, supra*, and *Pennoyer v. Neff*, 95 U.S. 714 (1878), this Court reaffirmed the

The lower court's ruling that AT&T's ownership of the stock of the operating companies prior to divestiture established legal privity for all purposes is erroneous. Its finding that privity to represent and bind the BOCs would not be destroyed, even if the interests of AT&T and the BOCs diverged, conflicts directly with this Court's ruling in *Sam Fox*, *Hansberry* and their progeny.[65]

The consequences of the lower court's misinterpretation of the law of privity is highlighted by the fact that the injunctive provisions at issue here did not take effect until after the legal relationship between AT&T and the operating companies had ceased to exist. Thus, the lower court's characterization of the issue—whether "a parent may . . . bind its wholly owned subsidiaries without affording them independent legal representation" [66]—was far too broadly framed since this case actually involved a parent attempting to restrict severely the activities of its subsidiaries *after* they ceased to be its subsidiaries.

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importance of representation before a judicial tribunal in order for a judgment to be enforced:

> Although injunctions issued by federal courts bind not only the parties defendant in a suit, but also those persons "in active concert or participation with them who receive actual notice of the order by personal service or otherwise," . . . a non-party with notice cannot be held in contempt until shown to be in concert or participation. It was error to enter the injunction against Hazeltine, without having made this determination in a proceeding to which Hazeltine was a party. 395 U.S. at 112.

[65] The lower court also cites this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (in another context) for the proposition that "under the antitrust laws, corporations and their wholly owned subsidiaries function as a single enterprise." 797 F.2d at 1088. *Copperweld*, however, dealt with only a single "narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act." 467 U.S. at 767. This Court's negative answer to the above question does not give credence to the proposition advanced by the lower court.

[66] 797 F.2d at 1088.

Lawful privity was established by AT&T, as shareholder of the operating companies, to agree to dispose of its subsidiaries' stock or assets—by way of sale, spin-off or otherwise. Petitioner is thus not arguing here that the divestiture itself was unlawful or should be reversed. AT&T likewise had the ability to commit itself to those injunctive provisions of the decree which apply to it—such as a seven year prohibition against entering the electronic publishing business. The *MFJ*, however, purports to bind the operating companies to a prospective, prohibitive injunction which precludes them from conducting lawful business after any conceivable privity between AT&T and the operating companies had been dissolved. AT&T's attempt to insulate itself from competition by limiting the activities of the operating companies after divestiture, without affording them an opportunity to be heard, thus falls well beyond its shareholder power and violates the concept of legal privity.

In summary, the lower court's ruling that privity may be established and maintained in a manner inconsistent with the basic due process rights of entities not parties to a lawsuit is contrary to key decisions of this Court. For purposes of binding the post-divestiture business operations of the operating companies, AT&T and the operating companies were not in privity—and could not have been in privity unless AT&T had adequately represented the post-divestiture interests of the operating companies.

C. The Lower Court's Ruling Is Inconsistent With Other Relevant Decisions Of This Court

The decision under review also ignores this Court's decision in *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*[67] in which a consent decree was remanded for hearing, at least in part, based on the following finding by this Court:

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[67] 386 U.S. 129, 137-38 (1967).

> As already indicated, the proposed decree provides the terms of contracts imposed on the New Company [to be formed by El Paso upon divestiture] respecting the purchase and gathering of gas from various sources. It is urged that these contracts are onerous, detrimental to the New Company, and partial to El Paso interests. We do not pass upon the wisdom or desirability of the proposed contracts. It is enough to note that they were proposed by El Paso, that the changes reluctantly acceded to by the government, will redound to the substantial benefit of El Paso, and that *the New Company has had no opportunity to evaluate the advisability of the terms or to negotiate for better terms.* Nor has the Federal Power Commission had the opportunity to pass upon the contracts. *The terms of these contracts should be negotiated by the New Company* under such restrictions as the Natural Gas Act may impose. (Footnote omitted and emphasis added.)

Consistent with *Cascade*, the lower court here agreed that a company acquired by another was "entitled" to independent legal representation during litigation aimed at divestiture. In fact, the lower court recognized this principle of law under its own established precedent—*F.T.C. v. Exxon Corp.*[68]—a case involving the proper application of traditional notions of due process. Inconsistent with *Cascade*, however, the lower court found that the distinguishing factor in *Exxon* was that it involved a Federal Trade Commission ("FTC") suit challenging the acquisition of a separate company ("the Drives Group"), and therefore, unlike the instant situation, involved two definable entities which could be represented separately.[69] The lower Court's acquisition-based

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[68] 636 F.2d 1336 (D.C. Cir. 1980).

[69] In contrast to the Court of Appeals assumption that Exxon and the Drives Group could be neatly separated, the Court in *Exxon* actually stated that the "Drives Group is now subsumed by Exxon." 636 F.2d at 1346.

theory results in a completely illogical application of due process rights.

The decision under review essentially finds that where divestiture is contemplated, due process analysis requires an initial determination of when the defendant purchased the subsidiary corporation sought to be divested. If the subsidiary was recently purchased, traditional due process protections and adequate representation apply. If the subsidiary had been owned for a more lengthy period of time, its interests receive no protection at all. Thus, there is no logical basis upon which to draw such a distinction—a fact underscored by this Court's decision in *Cascade*, wherein the entity which was granted separate representation status was an entirely new corporation.

In addition, the interests considered in *Exxon* which led to the finding that the appointment of a separate representative for the acquired subsidiary was essential are indistinguishable from the instant situation. In contrast to the lower court ruling here, the *Exxon* Court found that although Exxon and the acquired Drives Group shared a "corporate identity" and a common interest in obtaining final approval of the acquisition in the face of an FTC divestiture lawsuit, "that identity might be shattered as a result of the challenge mounted by the FTC . . . ." [70] Consistent with traditional notions of due process, the Court recognized that "[t]his possibility . . . gives rise to a fundamental conflict" [71] and joint representation therefore would be improper. Directly contrary to the decision under review, the Court recognized:

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[70] *Id.* at 1345.

[71] *Id.*

> [I]t is not the Drives Group as part of Exxon that Exxon may not represent; it is the Drives Group as *potentially* separate from Exxon that Exxon is prohibited from representing.[72]

Thus, it is virtually impossible to distinguish *Exxon* unless artificial distinctions are deemed to control basic representational rights derived from the Due Process Clause. Although the *Exxon* decision is not a case decided by this Court, petitioner submits it is a worthy example of the proper application of the legal principles reviewed herein and commend it to the Court's attention.

CONCLUSION

The decision below essentially creates a sweeping exception to the due process-based notion that a non-party to a lawsuit cannot be bound by a judgment unless its interests were adequately represented—or at least it had a fair opportunity to be represented. The decision below also repudiates the rule of law established by this Court that a corporate stockholder owes a fiduciary duty to a subsidiary whenever the stockholder attempts to exercise dominion and control over the operations of the subsidiary.

Both of the above rulings underpin the continued applicability of the *MFJ*'s prospective line of business restrictions to U S WEST and its subsidiaries and are contrary to well-established decisions of this Court. These fundamental legal errors are of significance far beyond their specific impact on U S WEST. If left intact, they could dramatically alter the essential representational rights guaranteed by the Due Process Clause of the United States Constitution.

Petitioner therefore respectfully requests that this Petition for a Writ of Certiorari to the United States Court

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[72] *Id.* at 1346-47. (Emphasis added.)

of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

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86-776

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

U S WEST, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA

and

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5118

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
BELL ATLANTIC CORPORATION,
Appellant.

No. 86-5163

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
PACIFIC TELESIS GROUP,
Appellant.

No. 86-5164

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
US WEST, INC.,
Appellant.

Argued May 16, 1986

Decided Aug. 15, 1986

Before MIKVA, SCALIA and BUCKLEY, Circuit Judges.

Opinion for the court filed by Circuit Judge BUCKLEY.

BUCKLEY, Circuit Judge:

This case presents a number of questions arising from the 1982 antitrust consent decree under which American Telephone and Telegraph Company ("AT & T") was divested of the Bell operating companies ("BOCs")—the twenty-two AT & T subsidiaries engaged in the business of providing local telephone service. The consent decree provided for the creation of seven regional holding companies ("RHCs") to own and operate the BOCs,[1] and it subjected the BOCs to stringent line-of-business restrictions. The district court has been asked on a number of occasions to interpret the scope of these restrictions, and in this case three of the RHCs challenge one such interpretation.

Appellant US West asks us to hold that the restrictions of the consent decree are not binding on the RHCs because they were not parties to it. Appellants US West, Bell Atlantic, and Pacific Telesis dispute the district court's finding that the consent decree prohibits the RHCs from providing "exchange telecommunications services," including two-way mobile telephone and one-way paging services, outside of their respective geographic regions. Bell Atlantic also appeals a subsequent order requiring it to discontinue the extraregional activities of its paging service subsidiary. Finally, US West appeals the district court's denial of a request by Ameritech for authorization to provide "shared tenant services," which would allow tenants of a building to use

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[1] The seven RHCs are American Information Technologies Corp. ("Ameritech"), Bell Atlantic Corp., BellSouth Corp., NYNEX Corp., Pacific Telesis Group, Inc., Southwestern Bell Corp., and US West, Inc.

centralized facilities to route long distance calls in accordance with predetermined cost and traffic analysis criteria.

We hold that the RHCs are bound by the consent decree, that the decree does not prevent the RHCs from providing exchange services outside their geographic regions, and that the district court therefore erred in ordering the RHCs to stop providing extraregional exchange services. We do not reach the merits of the shared tenant services issue because Ameritech did not appeal the district court's denial of its request for a ruling that the decree permitted such services, and US West is without standing to obtain review of the district court's decision.

I. Factual Background

The January 1, 1984 breakup of the Bell System stems indirectly from an antitrust action brought against AT & T by the Justice Department in 1949. This action led to the entry of a consent decree in 1956 that prohibited AT & T from conducting any business unrelated to providing common carrier communications services. In 1974 the government brought a second antitrust action alleging that AT & T had used its monopoly (or "bottleneck") control over local telephone service to the disadvantage of competitors in the long distance and telecommunications equipment markets. While this action was being tried in the district court, the parties announced an agreement by which they proposed to settle the case. *See generally United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131, 135-40 (D.D.C. 1982), *aff'd mem. sub nom., Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983).

The proposed consent decree split the Bell System into two basic parts—the competitive portion of the business, which would provide long distance service, manufacture telecommunications equipment, and conduct research, and the noncompetitive portion of the business, which would

continue to have bottleneck control of local telecommunications service. The competitive portion was to be retained by AT & T and its Western Electric and Bell Labs subsidiaries, while the noncompetitive portion was assigned to the RHCs and their BOC subsidiaries. The distinction between the two portions of the business was to be preserved by creating "exchange areas," generally centering on a metropolitan area, within which BOCs would provide "exchange telecommunications services" consisting principally of local telephone service. The right to provide long distance "interexchange telecommunications services" was reserved to AT & T and its non-Bell System competitors. *See generally id.* at 140-43.

In accordance with the provisions of the Tunney Act, 15 U.S.C. § 16(b)-(h), the district court conducted public proceedings to determine whether the proposed consent decree was in the public interest. As a result of these proceedings, the district court made a number of relatively minor changes in the proposed decree and authorized its implementation. *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. at 225. The divestiture formally took place on January 1, 1984, when ownership of the twenty-two BOCs was transferred to the seven RHCs, and the stock of the RHCs was distributed to AT & T's shareholders.

This case involves the extent to which the RHCs and BOCs are prohibited by the consent decree from engaging in certain business activities. The principal business restrictions on the BOCs are set forth in section II(D) of the consent decree, which provides that:

> After completion of the reorganization . . . no BOC shall, directly or through any affiliated enterprise:
>
> 1. provide interexchange telecommunications services or information services;
>
> 2. manufacture or provide telecommunications products or customer premises equipment (except for

provision of customer premises equipment for emergency services); or

3. provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff.[2]

This provision is subject to section VIII(C) of the decree, which states:

The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

Because of uncertainty over whether certain proposed business ventures were permissible under section II(D), such that no waiver under section VIII(C) would be necessary to engage in them, several RHCs filed motions for clarification with the district court.[3] In a decision

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[2] The final consent decree is appended to the district court decision in *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131, 226-34 (D.D.C. 1982).

[3] Ameritech filed motions requesting that the decree be interpreted to permit the RHCs to provide, *inter alia*, cellular radio services, including paging and mobile telephone services, outside of their geographic regions and shared tenant services to long distance users within their regions. US West similarly asked for a ruling that it could provide cellular radio services outside of its region. US West's district court brief supported Ameritech's motion with respect to shared tenant services, but US West did not join in that motion. Pacific Telesis asked that the decree be interpreted to permit it to provide exchange telecommunications services, including paging and mobile telephone services, outside of its region. Bell Atlantic filed a brief in support of Pacific Telesis' motion, but did not join that motion. *See United States v. Western Electric Co.*, 627 F. Supp. 1090, 1093 n.1 (D.D.C. 1986).

dated January 13, 1986, the district court denied all of the motions. *See United States v. Western Electric Co.*, 627 F. Supp. 1090 (D.D.C. 1986).

Two district court determinations are pertinent to this appeal. First, the court held that RHCs may not provide two-way mobile telephone and one-way paging services outside of their geographic regions absent a section VIII(C) waiver. The court reasoned that such services are "exchange telecommunications services" under the consent decree and that the decree implicitly prohibits the RHCs from providing exchange services outside of their geographic regions. Second, the court ruled that the decree prohibits the RHCs from selling certain "shared tenant services" within their regions. Sales of such services essentially involve bulk purchase of long distance service from interexchange carriers and discount resale of this service to groups of office building tenants. The proposal before the court did not involve sale of a complete package of shared tenant services. Rather, Ameritech proposed to sell such elements of shared tenant service as "least-cost routing," which involves programming a switch to select interexchange carriers in accordance with customers' wishes, and "traffic analysis," which involves studying customers' long distance usage patterns in order to facilitate routing at the lowest cost. The court explained that such services constitute "interexchange telecommunications services," which the BOCs are prohibited from offering under section II(D) of the consent decree.

In an order dated February 14, 1986, the district court noted that Pacific Telesis, Southwestern Bell, and Bell Atlantic were providing mobile telephone and paging services outside of their regions and reviewed the plans that the three companies had submitted for complying with the court's January 13 decision. Pacific Telesis and Southwestern Bell had both pledged to discontinue all extraregional exchange services within ninety days, and

the court agreed to grant these companies until April 17, 1986 to terminate their extraregional operations. Bell Atlantic had promised to discontinue the extraregional mobile telephone operations of its A Beeper Company subsidiary, but it asked for permission to continue providing extraregional paging services pending Justice Department review of its petition for a waiver under section VIII(C) of the consent decree authorizing it to remain in that business. The court denied this request and ordered Bell Atlantic to stop providing exchange services outside of its region by April 17, 1986. This order was subsequently stayed pending appeal of the court's January 13 and February 14 orders.

On February 26 the district court granted a waiver to Pacific Telesis authorizing it to provide certain extraregional paging and mobile telephone services. A waiver was also granted to NYNEX on March 13, permitting it to provide mobile telephone service outside of its region. On May 14 the district court granted a waiver to Bell Atlantic, authorizing its A Beeper Company subsidiary to provide extraregional paging services. This waiver, however, is subject to the limitation that A Beeper not market paging services actually provided by other RHCs and their BOC subsidiaries. Because much of A Beeper's extraregional business consists of marketing services provided by other RHCs, Bell Atlantic has continued to express dissatisfaction with the district court's decisions.

In this appeal, US West, Bell Atlantic, and Pacific Telesis seek reversal of the district court's January 13 decision insofar as it prohibits the RHCs from providing extraregional exchange services without prior court approval. Bell Atlantic also appeals the court's February 14 order limiting the operations of its A Beeper Company subsidiary. In addition, US West appeals the portion of the January 13 decision that denies Ameritech's request for authorization to provide shared tenant services. The court's subsequent orders granting waivers to Pacific

Telesis, NYNEX, and Bell Atlantic are not directly at issue in this appeal.

II. Discussion

A. *Applicability of the Consent Decree to the RHCs*

Alone among the RHCs, US West argues that the consent decree does not bind the RHCs. US West advances two lines of analysis, either one of which it contends compels the conclusion that the RHCs are free to provide the services at issue in this case. First, it claims that application of the consent decree's restrictions to the RHCs and BOCs offends due process because the RHCs and BOCs were not parties to the underlying antitrust proceeding, did not have independent legal representation, and never actually consented to the decree. Second, it asserts that even if application of the decree to the RHCs and BOCs does not offend due process, the RHCs are nonetheless free from the decree's restrictions because the literal terms of the decree limit only the activities of the BOCs and do not purport to constrain the RHCs. We find neither of these arguments persuasive and hold that the RHCs and BOCs are subject to the restrictions of the consent decree.[4]

US West's due process argument fails because it ignores the facts that AT & T was a party to the antitrust proceeding and both the RHCs and the BOCs were wholly owned subsidiaries of AT & T at the time the consent

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[4] The government suggests that we need not reach the merits of this issue because it was not raised by US West in the district court. However, US West did express doubts as to the decree's applicability to the RHCs, Reply Comments of US West to Ameritech's Motion Regarding Shared Tenant Services at 2 n.2, and the district court felt compelled to respond to US West's contention. *United States v. Western Electric Co.*, 627 F. Supp. at 1093 n.2. Under these circumstances, our usual reluctance to reach issues not raised in the district court does not prevent us from considering this issue. *See District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984).

decree was entered. This intimate corporate affiliation distinguishes the instant case from *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961), and *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), cited by US West, which held only that class members not adequately represented by class representatives may not be bound by judgments entered against the class. US West also cites *Federal Trade Commission v. Exxon Corp.*, 636 F.2d 1336 (D.C. Cir. 1980), which establishes that a company being acquired by another company may be entitled to independent legal representation. US West cites no authority, however, for the remarkable proposition that a parent may not bind its wholly owned subsidiaries without affording them independent legal representation. It is self-evident that due process does not require such representation. Because the RHCs and BOCs were AT & T's privies in the antitrust proceeding, the consent decree is binding on the former AT & T subsidiaries even though they were not parties to the action. *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870 (5th Cir. 1984).

US West's related suggestion that AT & T breached a fiduciary duty owed to the RHCs and BOCs by consenting to onerous restrictions on its former subsidiaries is both specious and irrelevant. It is specious because the only duty owed by AT & T was to its shareholders, who were identical to the initial RHC shareholders. Even if US West is correct in asserting that AT & T agreed to restrictions on the RHCs and BOCs in order to free itself of restrictions, there was nevertheless no injury to the shareholders. AT & T was merely allocating Bell System assets and liabilities among different portions of the business in anticipation of divestiture. US West's fiduciary duty argument is irrelevant because even if US West could show that AT & T breached such a duty, this would at most demonstrate that the RHCs have a cause of action against AT & T. It would not follow

that the RHCs are entitled to judicial relief from the obligations of the consent decree.

US West's contention that the RHCs are not restricted under the literal terms of the consent decree also fails upon close examination of the decree. At least three provisions of the decree make clear that the RHCs, as well as the BOCs, are subject to the consent decree's line-of-business restrictions. First, section III of the decree states "[t]he provisions of this [decree], applicable to each defendant and each BOC, shall be binding upon said defendants and BOCs, their affiliates, successors and assigns . . . ." Section IV(a) defines "affiliate" to include "any organization or entity, including defendant Western Electric Company, Incorporated, and Bell Telephone Laboratories, Incorporated, that is under direct or indirect common ownership with or control by AT & T or is owned or controlled by another affiliate." As the district court explained in its January 13 decision, because the RHCs were wholly owned subsidiaries at AT & T prior to the divestiture, they are "affiliates" within the meaning of section IV(A) and therefore are bound under section III of the decree. *United States v. Western Electric Co.*, 627 F.Supp. at 1093 n. 2.

Second, section IV(C) defines the term "BOC" to include "any entity directly or indirectly owned or controlled by a BOC or affiliated through substantial common ownership." Because the shareholders of the RHCs directly own the RHCs and indirectly own the BOCs, the RHCs and BOCs are "affiliated through substantial common ownership." *See Braun v. Insurance Co. of North America*, 488 F.2d 1066, 1067 (5th Cir.1974).

Finally, in setting forth the consent decree's line-of-business restrictions, section II(D) states that "no BOC shall, directly or through any affiliated enterprise [engage in conduct proscribed by the decree]." For the reasons stated above, the RHCs are affiliated with their sub-

sidiary BOCs, and the RHCs are accordingly subject to the restrictions of section II(D).

We are not troubled by US West's observation that the decree's expansive definition of a BOC results in broad application of the decree's restrictions to RHCs and other companies affiliated with BOCs. This result is consistent with the decree's objective of sharply limiting the ability of businesses with bottleneck control of local telephone service to utilize their monopoly advantages to affect competition in competitive markets. *United States v. American Telephone and Telegraph Co.*, 552 F.Supp. at 142. It is also consistent with the Supreme Court's recent recognition that, under the antitrust laws, corporations and their wholly owned subsidiaries function as a single enterprise. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). Moreover, the impact of the decree's restrictions on companies affiliated with BOCs is mitigated by section VIII(C), the decree's waiver provision, which requires that BOCs be granted the right to engage in activities otherwise proscribed "upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter."

B. *Extraregional Exchange Services*

Because the RHCs are bound by the decree, it is necessary to reach the issues of consent decree interpretation presented in this appeal. In an earlier decision the district court ruled that two-way mobile telephone and one-way paging services are "exchange telecommunications services" within the meaning of the decree, *United States v. Western Electric Co.*, 578 F.Supp. 643, 645 (D.D.C.1983), and appellants US West, Bell Atlantic, and Pacific Telesis do not now contest this conclusion. They argue, however, that the district court erred in its January 13 decision in ruling that they are prohibited

by the decree from providing exchange telecommunications services outside of their respective geographic regions. There contentions in this regard are supported by *amicus* briefs filed on behalf of Ameritech, BellSouth, NYNEX, and Southwestern Bell.

This court has held that the "construction of a consent decree is essentially a matter of contract law . . . ." *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125 (D.C.Cir.1983), *cert. denied*, 467 U.S. 1219, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984). Accordingly, the district court's construction of the decree is subject to *de novo* review by this court. *See Willie M. v. Hunt*, 657 F.2d 55, 59 (4th Cir.1981). The principles of consent decree construction were elucidated by the Supreme Court in *United States v. Armour & Co.*, 402 U.S. 673, 682, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971), where it observed that "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." It has further held that in the enforcement of a consent decree, "reliance upon certain aids to construction is proper, as with any other contract." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238, 95 S.Ct. 926, 935, 43 L.Ed.2d 148 (1975). These include "the circumstances surrounding the formation of the consent order . . . ." *Id.* We need not decide whether this is a case where it is appropriate to consider evidence extrinsic to the consent decree, because in this case such evidence does not change our result. We conclude that neither the express language of the consent decree nor the circumstances of its formation will support the territorial restrictions imposed on exchange services by the district court.

None of the parties to the instant case contends that an explicit prohibition on the provision of extraregional exchange services is contained within the four corners of the consent decree. The district court found, however,

that "it is clear for a number of reasons that the Operating Companies were intended to be limited to their own local areas in furnishing exchange telecommunications services." *United States v. Western Electric Co.*, 627 F.Supp. at 1106. The district court listed eight such reasons, including both provisions of the decree that allegedly contain implicit geographic restrictions on RHC operations, and evidence extrinsic to the decree that purportedly reveals an intent to impose such restrictions. *Id.* at 1106-08. We have considered the reasons identified by the district court, as well as other "aids to construction" cited by the parties, but we are unable to conclude that the parties to the decree reached any agreement on the issue of extraregional exchange services.

We do not agree with the district court that various provisions of the decree implicitly impose geographic restrictions on RHC and BOC operations. The fact that the criteria set forth in section IV(G) for establishing exchange areas are all local in nature has no bearing on the question of whether a geographic restriction was intended to be imposed on all subsequent RHC and BOC exchange activities. The local nature of these criteria was merely a function of the need, at the time of divestiture, to divide the Bell System's local operations into coherent units in which BOCs could function without entering the interexchange, or long distance, business.

Similarly, the fact that section IV(G) assigned the responsibility for establishing exchange areas within their respective regions to the BOCs reflects nothing more than simple necessity. Prior to January 1, 1984, when the system of exchange areas came into effect, the BOCs were the only providers of local telecommunications service within their respective regions; there was no other logical entity to draw exchange areas. It does not follow from this that each BOC was precluded from providing exchange services in exchange areas drawn by other BOCs.

Identical logic explains why, pursuant to section I of the decree, AT & T assets necessary to provide local telephone service were distributed to the BOCs on a geographic basis. This plan of distribution merely shows that the initial division of markets was geographic; it does not mean that after divestiture the initial geographic boundaries were to be inviolable.

We are unable to understand the district court's suggestion that sections VIII(A) and VIII(B) of the decree, which authorized the BOCs to sell customer premises equipment and publish telephone directories, reveal an intent to geographically restrict other BOC operations. These sections, which were adopted as amendments to the decree at the court's insistence, merely authorize the BOCs to enter lines of business that would otherwise be prohibited to them under section II(D). Sections VIII (A) and VIII(B) plainly do not purport to lift any geographic restrictions on these activities to which the BOCs would be subject in the absence of the sections. Thus, far from supporting the district court's conclusion, the fact that all parties to the decree have assumed that the RHCs and BOCs may sell customer premises equipment and publish telephone directories on a nationwide basis supports appellants' claims. If the RHCs and BOCs may engage in these activities outside of their regions without a waiver of geographic restrictions, it is not unreasonable to assume that other activities permitted under the decree may be conducted nationwide as well.

In view of the foregoing, we conclude that there is no explicit or implicit geographic restriction of RHC and BOC operations contained within the four corners of the consent decree. When we look beyond the language of the decree, we remain unpersuaded that the parties to the decree intended to prohibit provision of extraregional exchange services.

We recognize that certain of the "aids to construction" in this case suggest that the parties and the district court assumed that the RHCs and BOCs would confine themselves to providing exchange services within their respective regions. For instance, in approving the proposed consent decree, the district court stated that "[e]ach of the divested Operating Companies will have a monopoly in only one geographic portion of one [telecommunications] market[]—local telecommunications." *United States v. American Telephone and Telegraph Co.*, 552 F.Supp. at 187. Later, in a portion of its opinion approving the plan of reorganization submitted by AT & T pursuant to section I of the decree, the district court observed that "[w]ith respect to exchange telecommunications . . . the Operating Companies and the Regional Companies will, by definition, be limited to clearly defined geographic areas . . . ." *United States v. Western Electric Co.*, 569 F.Supp. 1057, 1081 (D.D.C.1983). Certain RHC filings with the Federal Communications Commission suggest that the RHCs may have shared the district court's understanding. *See* Comments of Associated Bell System Companies at 13, FCC CC Docket No. 83-115 (Apr. 25, 1983); Reply Comments of Associated Bell System Companies at 13, FCC CC Docket No. 83-115 (May 25, 1983); Joint Petition for Reconsideration of Indiana Bell, Michigan Bell, and Ohio Bell at 13, 15, 16, FCC CC Docket No. 83-115 (Feb. 10, 1984).

There are also indications in the record, however, that the drafters of the consent decree did not intend to prohibit the RHCs from furnishing exchange services outside of their respective regions. For example, both Assistant Attorney General for Antitrust Enforcement William F. Baxter and AT & T Vice President and General Counsel Howard J. Trienens testified before committees of Congress that it would have been possible under the consent decree for AT & T to combine all of the BOCs into a single nationwide operating company. *See AT &*

T Proposed Settlement: Hearings Before the Senate Comm. on Commerce, Science and Transportation, 97th Cong., 2d Sess. 73 (1982) (testimony of William F. Baxter); *Department of Justice Oversight of the United States v. American Telephone and Telegraph Lawsuit: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 112, 141-42 (1982) (prepared statement of William F. Baxter; testimony of Howard J. Trienens). This conclusion was compelled by section I(A)(4) of the decree, which states that "nothing in this decree shall require or prohibit the consolidation of the ownership of the BOCs into any particular number of entities." The possibility of a single nationwide operating company is obviously inconsistent with the existence of geographic limitations on exchange telecommunications, for if there were only one operating company it would necessarily provide local telephone service throughout the country.

The absence of geographic restrictions is also suggested by events surrounding Bell Atlantic's efforts to solicit the views of the Department of Justice concerning its plans to acquire A Beeper Company. As explained in affidavits filed with the district court, the Justice Department initially advised Bell Atlantic that the fact that A Beeper provided exchange services outside of the Bell Atlantic region would not place Bell Atlantic in violation of the consent decree. *See* Affidavit of James H. Dickerson ¶¶ 4-6. In fact, there was internal disagreement within the Justice Department as to whether the consent decree prohibited the provision of extraregional services, but the existence of this disagreement was not initially communicated to Bell Atlantic. *See id.* ¶ 12; Affidavit of James P. Denvir ¶ 6; Supplemental Affidavit of James P. Denvir ¶¶ 2, 3; Affidavit of Richard O. Levine ¶ 12. We consider the existence of internal disagreement to be significant, for if the Justice Department found the decree ambiguous in this regard, it is most unlikely that the parties to

the decree ever reached an agreement on the issue of extra-regional exchange services.

We suspect that the uncertainty surrounding this issue has a simple explanation: the parties and the district court never considered the possibility that the BOCs might want to provide exchange services outside of their geographic regions. It must be remembered that exchange service consists principally of local landline telephone service, and it is hardly conceivable that one BOC would want to enter another BOC's area in order to provide such traditional service in competition with the established BOC. This case, on the other hand, involves special types of exchange service that can be provided in competition with an established BOC, and we think it likely that the drafters of the consent decree simply did not consider such a possibility. Had they considered it, they might have proscribed it (though in view of its procompetitive effect, that is far from certain). The question before the court, however, is whether we may now read such a proscription into the decree. Under *Armour* and *ITT Continental Baking*, it is clear that we may not. We therefore reverse the district court's January 13 decision insofar as it held that the RHCs may not provide exchange telecommunications services outside of their respective regions.

C. *Orders Requiring Termination of Extraregional Exchange Services*

Because the consent decree does not limit the RHCs to providing exchange services within particular geographic areas, it necessarily follows that we must vacate the district court's February 14 order requiring the RHCs to cease providing extraregional exchange services. The court's subsequent orders granting waivers to Pacific Telesis, NYNEX, and Bell Atlantic are not before us. We assume, however, that the court will vacate these insofar as they purport to restrict the right of the RHCs to pro-

vide exchange services outside of their respective regions. Like the court's February 14 order, these orders incorrectly presuppose that the RHCs may not furnish such services without court authorization.

D. *Shared Tenant Services*

The final issue presented in this appeal is US West's contention that the district court erred in ruling that Ameritech's proposal to furnish certain shared tenant services would violate the decree's proscription on BOC involvement in the interexchange telecommunications business. The district court reasoned that the types of services Ameritech proposed to provide—least-cost routing and traffic analysis—would inject it into the interexchange business and would therefore contravene section II(D) of the decree. Ameritech has not appealed this decision, and we hold that US West does not have standing to independently appeal the decision.

It is axiomatic that "a party may only appeal to protect its own interests, and not those of a coparty." *Libby, McNeill, and Libby v. City National Bank*, 592 F.2d 504, 511 (9th Cir.1978). *See also Barry v. District of Columbia Board of Elections and Ethics*, 580 F.2d 695, 697 (D.C.Cir.1978). It follows that the district court's ruling on the shared tenant services issue is properly before this court only to the extent that it binds US West; Ameritech's failure to appeal leaves it subject to the ruling. *United Steelworkers of America v. University of Alabama*, 599 F.2d 56, 59 (5th Cir.1979). Because we conclude that the ruling does not bind US West, we must dismiss US West's appeal for want of standing.

As Ameritech acknowledged in the district court, shared tenant services "are in the gray area of an 'overlap' between exchange and interexchange activities." *United States v. Western Electric Co.*, 627 F.Supp. at 1099. A number of different types of services fall under the shared tenant services rubric, and it is not evident that all of them are properly characterized as interex-

change services. In deciding Ameritech's motion for clarification, the district court was required to determine whether the actual services that Ameritech intended to provide were most akin to permitted exchange or prohibited interexchange activities. The court's conclusion that Ameritech's proposal most resembled interexchange service cannot bind US West unless the actual services that US West wishes to provide are identical to those proposed by Ameritech. We have no basis for assuming that US West's proposal would be identical to Ameritech's and therefore we cannot find that US West is bound by the district court's ruling.

Were we to accept US West's invitation to review the ruling, we would have to speculate as to what services US West might wish to provide, and our decision accordingly would be little more than an advisory opinion. The rules of standing exist precisely to avoid the uncertainty that this course would entail. We accordingly hold that the share tenant services issue is not properly before this court. If US West wishes to pursue this issue, it should frame its own specific shared tenant services proposal, obtain district court review of the proposal if it deems such review prudent, and then appeal any adverse decision to this court.

III. Conclusion

For the foregoing reasons, we hold that the RHCs are bound by the AT & T consent decree, that the decree imposes no geographic restraints on the areas in which RHCs may provide exchange services, and that the district court erred in ordering the RHCs to stop providing exchange services outside of their respective regions. We do not decide whether shared tenant services are prohibited interexchange activities under the decree because US West is without standing to obtain review of the district court's ruling on this issue.

It is so ordered.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 82-0192

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, *et al.*,
Defendants.

Jan. 13, 1986

OPINION

HAROLD H. GREENE, District Judge.

Pending before the Court for decision are a number of motions by various Regional Holding Companies for clarification of the decree.[1] The motions represent the view of several of the Regional Companies[2] that they are

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[1] Ameritech has filed three of these motions, requesting that the decree be interpreted to permit Regional Companies to provide (1) cellular radio services outside their geographic regions, (2) voice storage and retrieval services to cellular customers, and (3) shared tenant services. Pacific Telesis asks that the decree be clarified to allow it to provide exchange telecommunications services outside of California and Nevada. NewVector's motion asks for a ruling that its provision of cellular radio services outside of the U S West region is authorized by the decree. Each of the motions is supported by several other Regional Companies.

[2] Although the line of business restrictions in section II(D) of the decree are addressed to the Operating Companies without any

entitled under the decree to engage in a substantial range of telecommunications activities without obtaining waiv-

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explicit reference to the Regional Companies (which did not exist when the decree was negotiated), they clearly also apply to the latter, and arguments to the contrary (see note 18 *infra*) are without merit.

Section III provides that the provision of the decree shall be binding upon the parties and each of the Operating Companies, including "their affiliates, successors and assigns. . . ." Section IV(A) goes on in pertinent part to define an "affiliate" as any organization or entity under direct or indirect common ownership with or control by AT & T, and "subsidiary" as any organization or entity in which AT & T has stock ownership, and section IV(C) defines the term "BOC," *i.e.*, Operating Company, *inter alia*, as "any entity directly or indirectly owned or controlled by [an Operating Company] or affiliated through substantial common ownership."

The Regional Companies were created prior to divestiture pursuant to the Plan of Reorganization as wholly-owned subsidiaries of AT & T. That plan, submitted by AT & T to the Court for approval pursuant to section VIII(J) of the decree, implemented divestiture in part by requiring AT & T to contribute its stock in the Operating Companies to the seven newly-created Regional Companies and then separating these companies from AT & T. The plan proceeded on the premise that regional centralization of the ownership and management of the Operating Companies would result in a more efficient and practical restructuring of the local telephone industry than would have been possible with the establishment of all twenty-two Operating Companies as entirely independent and unrelated entities. See Part IV(A)(6) of the Plan of Reorganization notes 422 and 423. *See also, United States v. Western Electric Co.*, 569 F. Supp. 1057, 1062 n.5 (D.D.C. 1983), *aff'd, California v. United States*, 464 U.S. 1013, 104 S.Ct. 542, 78 L.Ed.2d 719 (1983); Department of Justice Competitive Impact Statement, 47 Fed. Reg. 7170, 7174, 7175 (February 17, 1982).

The Department of Justice's Competitive Impact Statement, in discussing the possibility that the Plan of Reorganization might be implemented by AT & T's transfer of the portion of its business providing local exchange service to new corporate entities, noted that "the local exchange enterprises would become [Operating Companies] for the purposes of this . . . [j]udgment regardless of their corporate name." 47 Fed. Reg. at 7174.

It is clear from the decree, the Plan of Reorganization, the Court's Opinions, and the Competitive Impact Statement that the

ers pursuant to section VIII(C) of the decree. In each case, the proffered interpretation is opposed by other entities, both commercial and governmental, which argue that the particular activities are prohibited by the decree.

After careful scrutiny of all the relevant factors, the Court has determined that the interpretations of the decree advocated by the Regional Companies in these motions are inconsistent with the language, history, and purposes of the decree,[3] and that all the motions for clarification[4] must therefore be denied. Before discussing the motions in detail, it is appropriate to restate the basic purpose underlying the prohibitions imposed by the decree on the local companies.

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establishment of the Regional Companies served only logistical purposes, and that it was not to have any substantive effect on the obligations of the entities exercising local telecommunications authority. It is likewise clear that the Regional Companies are bound by the decree both as subsidiaries of AT & T prior to divestiture and as affiliates of the Operating Companies subsequent thereto. Insofar as the prohibitions in the decree are concerned, the Operating Companies and the Regional Companies occupy identical positions, and the two types of entities will generally be referred to herein without distinction. See *United States v. Western Electric Co.*, 604 F. Supp. 256, 257 n.3 (D.D.C. 1984); *United States v. Western Electric Co., supra*, 569 F. Supp. at 1062 n.5.

[3] See *United States v. AT & T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd, Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983); *United States v. Western Electric Co.*, 592 F. Supp. 846, 855-58 (D.D.C. 1984).

[4] As MCI correctly points out, only a few months ago the Court established a detailed procedure and guidelines for Regional Companies to follow in requesting waivers from the line of business restrictions of the decree. The "clarification" strategy employed by the Regional Companies would undercut that process for the securing of relief from the provisions of the decree by the simple act of labelling the pleadings as requests for clarification rather than as motions for waivers or for modifications. MCI Opposition to Ameritech's Motion to Provide Cellular Service at 2-3.

I

General Considerations

A central rationale for the divestiture of AT & T was the recognition that, when one company engages both in monopoly activities—*e.g.*, the provision of local telecommunications service—and in competitive activities—*e.g.*, the provision of interexchange [5] and information services—it possesses the incentive and the ability improperly to exploit its local monopoly power in at least two ways.

First, such a company may subsidize its competitive ventures with income generated by the local telephone ratepayers (who, unlike the customers of a competitive enterprise, lack the ability to go elsewhere for their telephone service and who can therefore be charged whatever rates the local regulators can be persuaded to approve); [6] and second, it can give preferential treatment [7] to its own competitive affiliates, thereby impeding the success of non-affiliated competitors or even forcing them out of business.[8] Evidence was adduced by the government in the trial of this case that the Bell System was guilty of such practices.[9]

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[5] Interexchange services will sometimes also be referred to herein as long distance services, although some intra-LATA services—which are permitted to the Operating Companies—may also be regarded as long distance.

[6] See discussion in *United States v. Western Electric Co., supra*, 592 F. Supp. at 853-55.

[7] Such preferential treatment might consist, *inter alia*, of slowdowns in the interconnection of competitors' networks to the local switches; the grant of higher quality access to the monopoly provider's own competitive services; abusive regulatory and legal tactics; the manipulation of price for access; and the design of the local networks in such a manner as to discourage competition in the information field. *See United States v. AT & T*, 524 F. Supp. 1336, 1353-57 (D.D.C. 1981).

[8] See Competitive Impact Statement, *supra*, 47 Fed. Reg. at 7171.

[9] For example, there was evidence to support the Justice Department's claims that AT & T engaged in the types of practices re-

The history of the government's struggles with AT & T [10] indicated to those who negotiated and approved the current consent decree that, when the local companies were divested to continue on their own the provision of the local monopoly telecommunications services, they had to be prohibited from engaging also in competitive long distance and information services.[11] Accordingly, a specific prohibition to that effect—one of the few decree pro-

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ferred to above to impede interexchange competition from such companies as MCI, and to hinder competition in the sale of telecommunications equipment from a number of small manufacturers and suppliers. See *United States v. AT & T, supra*, 524 F. Supp. at 1348-57; see also, *United States v. AT & T, supra*, 552 F. Supp. at 160-62.

[10] An antitrust suit brought against AT & T in 1949 resulted in a consent decree signed in 1956, but that decree soon proved to be inadequate to solve the problems created by AT & T's status and actions. Thereafter, the Federal Communications Communication conducted several studies and took a variety of actions but in spite of these efforts it ultimately appeared that these activities could not, by themselves, overcome the advantages possessed by the Bell System, including its mixed monopoly-competitive position. It was because of these advantages that the instant lawsuit under the antitrust laws was brought in 1974 and maintained consistently thereafter by the Ford, Carter, and Reagan Administrations in spite of pressure to abandon it from both AT & T and several government departments. See generally, *United States v. AT & T, supra*, 552 F. Supp. at 170; Competitive Impact Statement, *supra*, 47 Fed. Reg. at 7171-72.

[11] Not one of the designated chief executive officers of the soon-to-be established Regional Companies suggested or intimated in the public interest proceeding held by this Court that, in addition to the local monopoly role assigned to them by the decree, the companies needed, required, or were at all interested in providing interexchange or information services. Although the companies which these executives represented were at the time still parts of the Bell System, they were encouraged by the Court, and they did, speak candidly about a number of issues of concern to these companies. See *United States v. Western Electric Co., supra*, 569 F. Supp. at 1062 and n.4.

visions directly applicable to the local companies—was incorporated in the decree.[12]

The logic of such a provision was as obvious as its incorporation in the decree was crucial. Without it, the result of the break-up would have been to exchange one nationwide monopoly with the incentive and ability to exploit monopoly power and injure competition for several smaller monopolies with the identical incentives and abilities. The only distinction between the "old" Bell System and the present Regional Company system was and is that the Bell monopoly was nationwide in scope while each of the seven Regional Companies possesses an equally powerful monopoly [13] in a particular geographic region.[14]

Insofar as the threat of injury to competition, competitors, and ratepayers is concerned, that distinction is one without a difference, for the "bottleneck" [15] monopolies continue to exist as before. These bottlenecks—*i.e.*, the local companies with their ownership of the local switching systems and thus of the pathways which the interexchange and information providers must use if they

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[12] Section II(D)(1) provides that after completion of the reorganization, "no [Operating Company] shall, directly or through any affiliated enterprise . . . provide interexchange telecommunications services or information services. . . ." The only other specific prohibition, found in section II(D)(2), prevents local operating companies from manufacturing customer premises equipment, and was included in the decree because of concern over the potential for similar types of anticompetitive behavior.

[13] The Regional Companies exercise these monopolies through their affiliated Operating Companies.

[14] See Parts III and IV *infra*, for a discussion of the current efforts of the Regional Companies to break down even the geographic restrictions of the decree.

[15] *See United States v. Terminal R.R. Assn. of St. Louis*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

wish to reach the ultimate consumers [16]—merely changed hands: instead of being controlled by the management of AT & T, they are now being controlled in each region by the management of a particular Regional Company. However, the ability to exploit the bottlenecks anticompetitively has remained precisely the same. It was on this basis that the prohibition against the provision of interexchange and information services became a central part of the decree.

That prohibition has far from outlived its usefulness.[17] Indeed, it could with some justification be argued that the Regional Companies, though obviously smaller than the Bell System, present dangers to competition that are in some respects even greater than those presented by that System.

AT & T was imbued with a service mentality, a tradition dating from the days of the chairmanship of Theodore Vail and continued through that of John deButts and Charles Brown. Although the company may have engaged in some or all of the anticompetitive activities with which it was charged, the balance wheel of the service tradition was always present. By contrast, the Regional Companies, or some of them, indicate by their public statements, their advertisements, and their rush to diversification, combined with their relative lack of interest in basic telephone service itself,[18] that an ascent

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[16] Although there has been some "bypass" of the local telecommunications systems which could potentially decrease dependence upon the bottleneck facilities controlled by the Regional Companies, by and large the technology and the economics are still such that the monopoly of these companies on local telephone service with respect to the overwhelming majority of the population has not been impaired.

[17] See discussion *infra*, note 26, on provisions in the decree for reviewing and removing decree's restrictions on the Regional Companies.

[18] Some of these companies, although created by the decree as providers of local telephone service, do not even acknowledge that the provisions of the decree apply to them, and they insist that

into the ranks of conglomerate America rates far higher on their list of priorities than the provision of the best and least costly local telephone service to the American public.[19] Anyone faced with the prospect of permitting

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the Court should not be concerned with the quality and price of such service. Reply Comments of U S West to Ameritech Motion for Shared Tenant Services at 2 note 2; U S West Post-Hearing Statement of August 14, 1985 at 10.

The assumption that high-quality, low-cost telephone service would be provided by the local companies was an essential ingredient in the Court's determination that the consent decree was in the public interest; in the Court's successful request for several modifications of the decree (to grant authority to the Regional Companies to market CPE and the Yellow Pages); and in the Court's demand for changes in the Plan of Reorganization (to transfer the "Bell" name and logo to the local companies and to award them access to AT & T's patent licenses). *United States v. American Telephone and Telegraph Co., supra*, 552 F. Supp. at 192-94; *United States v. Western Electric Co., supra*, 569 F. Supp. at 1078-81; *United States v. Western Electric Co.*, 569 F. Supp. 990, 996-97 (D.D.C. 1983). In light of that history, disdain shown by some Regional Companies for their telephone obligations is as inexplicable as it is disconcerting. Of course, not all the Regional Companies are oblivious of their obligations. *See, e.g.*, BellSouth Post-Hearing Memorandum of August 14, 1985.

[19] Although corporations engaged in competitive enterprises may merge, acquire, be acquired, or enter into foolish or unprofitable ventures, subject only to the discipline of the market and of such antitrust considerations as may be applicable, public utilities are not under such discipline and are in a different position: as the name implies, their *raison d'etre* is to serve the public. See generally, Garfield and Lovejoy, *Public Utility Economics*, 1-36 (1964). The public is entirely dependent upon the service they provide; it has a vital stake in its continued availability; and it can therefore always be depended upon to bail these companies out—through high or repeated rate increases granted with the compulsion of law by regulatory bodies—should they be neglectful or commit errors which jeopardize the continued availability of the service. *See United States v. Western Electric Co., supra*, 592 F. Supp. at 869-70. See also, *Re Tax Treatment of Accelerated Depreciation*, 33 P.U.R.3d 209, 214 (1960).

As a necessary corollary of the ability to command rates that generate profits, and in recognition of the public interest in such

these companies to enter competitive markets, particularly the interexchange and the information markets,[20] would therefore have to exercise considerable caution lest the companies be empowered, even encouraged, to use their local monopoly advantage as a means to decimate the competition in these markets and thus to enhance further their conglomerate ambitions.[21]

Moreover, unlike the Regional Companies, the Bell System was constrained significantly by the 1956 consent decree in that many of the newer technological markets, *e.g.*, computers, were out of its reach, and the System's managers were therefore content to concentrate their efforts on telecommunications. The Regional Companies, by contrast, are already expanding in almost every conceivable way, from real estate ventures to foreign trade, from publishing to computer retailing. Financial subsi-

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companies, most public utilities are closely regulated on both the state and federal levels as to what non-utility businesses they may operate. Holding companies owning public utilities are likewise closely regulated as to other businesses they may acquire or retain. See, *e.g.*, Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 *et seq.*; *Michigan Consolidated Gas Co. v. SEC*, 444 F.2d 913 (D.C. Cir. 1971); *Re Pequot Gas Co.*, 53 P.U.R.4th 598, 617 (Conn. 1983).

[20] It is with respect to these markets that the local telecommunications monopoly is most suspectible of successful anticompetitive manipulation.

[21] The decree in this case did not distribute the bulk of the assets of the American Telephone and Telegraph Company to the Regional Companies to enable the managers of these companies to use them as building blocks for the establishment of conglomerates unrelated or only marginally related to basic telephone service for the American public. See also, note 18, *supra*. These companies inherited billions of dollars in tangible and intangible assets at the time of divestiture because the Court and others concluded that these assets would be used in the public interest, that is, in the provision of excellent yet low-cost telephone service to American consumers, and that this objective would be accomplished without the re-creation of the dangers to fair competition that existed before. This Court firmly intends to enforce the decree in light of that purpose.

dies from ratepayer-supported local telephone activities to these many types of operations are both easier to hide and harder to detect than subsidies to only a few "outside" enterprises, and so are manipulations of the local loops to disadvantage the many competitors in the myriad of enterprises in which the Regional Companies are engaged.[22]

Through the memoranda filed by the Regional Companies in support of the Ameritech motion runs the thread that greater competition and the participation of more competitors in the telecommunications markets are in the public interest[23]—certainly an unexceptionable point as a generality. However, such arguments are drained of much of their persuasive force when they are applied to a situation where the would-be competitors could readily take advantage of their monopoly status in a variety of ways vis-a-vis their non-monopolistic competition.[24]

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[22] The Regional Companies claim here, as they have claimed earlier in other matters before the Court, that protection against anticompetitive practices and ratepayer gouging may safely be left to the local regulatory bodies. See *United States v. Western Electric Co., supra*, 592 F. Supp. at 854-55; see also, Ameritech Motion to Provide Cellular Services Outside its Region at 14; Reply Comments of U S West to Ameritech Motion to Provide Shared Tenant Service at 18; U S West Post-Hearing Statement of August 14, 1985 at 10-13. That, too, was an argument used by the Bell System, but on examination it was usually found to lack substance. See, *e.g., National Association of Regulatory Utility Commissioners v. F.C.C.*, 525 F.2d 630, 636-38 (D.C. Cir. 1976). The broad sweep of the Regional Companies, with their various competitive and non-competitive subsidiaries and affiliates, constitutes a significant impediment to effective oversight by local regulators who are confined to a single State. In any event, the Court is not relieved of its obligations under the decree (see section VII, VIII) because others may have responsibilities in related areas.

[23] See, *e.g.*, Ameritech Motion to Provide Cellular Services Outside of Region at 3, 8-17.

[24] An additional argument being advanced by the Regional Companies is that, should they not be permitted to enter the inter-

For that reason, the participation of the Regional Companies in the markets they wish to enter [25] would not be

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exchange markets, their financial ability to render local service, and hence that service, will suffer. See, *e.g.*, Ameritech Motion to Provide Shared Tenant Services at 5, 8-9, 15; Comments of US West in Support of Ameritech's Motion, to Provide Shared Tenant Services at 8-10. The Court has granted numerous waivers of the line of business restrictions to allow the companies to engage in a great variety of "outside" businesses. See, *e.g.*, *United States v. Western Electric Co., supra*, 604 F. Supp. at 257; Memorandum Order of August 22, 1985; Order of August 14, 1985; Order of May 24, 1985; Order of March 1, 1985. There is no reason why they cannot prosper financially in the exchange telecommunications and exchange access markets, the CPE and the directory advertising markets, and the new and legitimate outside enterprises which they have been allowed to enter. And in fact, they do appear to be flourishing financially. See text to note 60, *infra*.

The Regional Companies would be assured of extra-substantial financial profits in the interexchange and information markets only if they behaved the way the Bell System was found in several lawsuits to have behaved: by artificially disadvantaging their competitors in these markets with respect to access to the local networks or by cross-subsidization. See *United States v. AT & T, supra*, 552 F. Supp. at 189 n.235.

[25] To be sure, the current motions do not baldly assert that the Regional Companies have the right under the decree to engage in the interexchange and information businesses without limitation. It is worthy of note, however, that representatives of these companies are widely quoted in the press as desirous of breaking down these prohibitions entirely. See, *e.g.*, *Washington Post*, December 30, 1985, Washington Business Section at 1, 13; *Business Week*, December 2, 1985, at 94, 97, 101; *Wall Street Journal*, November 25, 1985, at 1, 22; *New York Times*, December 2, 1985, Section D, at 4; *Wall Street Journal*, February 24, 1984 at 40.

In any event, as discussed below, were the motions to be granted, the effect would be to position these companies on a slippery slope from which they could readily move to yet broader participation in the forbidden markets. That this concern is not chimerical is borne out by experience. To cite but one example out of several, in 1983 the Court granted the requests of some of the Regional Companies for entry into cellular markets outside of their exchange boundaries in several areas. *United States v. Western Electric Co.*,

likely to promote genuine, fair competition; the more probable outcome would be that such entry would deny to others engaged in commerce in those markets the level playing field to which they are entitled under law, under the decree, and in plain equity and justice.[26]

The current motions must and will be considered in that context.

II

Shared Tenant Services

In its shared tenant services motion, Ameritech [27] is asking for an order which would "clarify" the decree [28]

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578 F. Supp. 643 (D.D.C. 1983). Although that granted was limited to nine metropolitan areas with special problems, although it was explicitly described as so limited, and although it was clearly only a waiver of decree provisions, the Regional Companies are now blandly claiming that this precedent entitles them to enter the cellular market as of right, without a waiver, and on an unlimited, nationwide basis. See Ameritech Motion to Provide Cellular Services Outside of Region at 15 and note *; Ameritech Reply Memorandum on Motion to Provide Cellular Services Outside of Region at 7-8; Reply of NewVector to Responses to Ameritech's Motion at 3. The limitations at issue are too critical to the health of the nation's telecommunications industry to be so whittled away.

[26] The Regional Companies also suggest as a justification for being permitted to enter the markets at issue here that they are or soon will be beset by competition for the local telecommunications markets, in the form of bypass or otherwise. Section VIII(C) of the decree provides for this eventuality by stating that an Operating Company may enter a prohibited market when there is "no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." With respect to interexchange and information services, that means that an Operating Company may enter these fields when its own local monopoly has ended and there is substantial competition in the particular local telecommunications market. *United States v. Western Electric Co., supra*, 592 F. Supp. at 867-68. No movant has claimed that this condition now exists, and it plainly does not.

[27] The Ameritech motion is supported by two other Regional Companies, US West and Southwestern Bell.

[28] As is true with respect to all the motions, if the decree were "clarified" as the Regional Companies request, it would permit

to the effect that it permits the Regional Companies to provide certain shared tenant services,[29]—the marketing of automatic carrier selection and traffic analysis.[30]

The shared tenant services market has developed substantially over the past few years,[31] for such services present several advantages to both developers and tenants.[32]

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them to avoid having to meet the test of section VIII(C)—that there is no substantial possibility that they could use their monopoly power to impede competition in the market they seek to enter.

[29] Shared tenant services are the provision by a developer or building owner of a package of telecommunications and related services to tenants. Tenants' needs are then served on a shared basis using centralized voice and data switches and computers on the building premises. Ameritech Motion to Provide Shared Tenant Services, Exhibit A, at 2.

[30] Automatic carrier selection, a feature which can be offered through a shared PBX or Centrex, permits the switch to be programmed so as to select automatically an interexchange carrier for the caller. Such selection may be but is not necessarily based upon the lowest cost. In a shared tenant system, the provider programs the switch, and when a tenant thereafter attempts to make an interexchange call, the switch selects the pre-programmed carrier.

Traffic analysis involves the compilation and collation of data on the tenants' telecommunications usage—both individual and aggregate. Such analysis, when performed by a Regional Company, permits that company to recommend exchange and interexchange services as well as CPE and access lines to handle the traffic.

[31] According to Ameritech, before 1983 there were virtually no buildings with advanced shared-service capabilities while today there are some 70 such facilities in operation and another 50 expected shortly. Ameritech Motion to Provide Shared Tenant Services, Exhibit C, p. 2. *But see* Reply of Multi-Tenant Telecommunications Association (MTTA) to Comments on Ameritech Motion to Provide Shared Tenant Services at 4-5. According to some, that development is due to the competitive availability of interexchange services.

[32] Among the benefits to tenants are the cost savings associated with the aggregated demand which, depending upon the pricing policies of the providers of the services, may permit these tenants to acquire customer premise equipment, exchange services, and

Accordingly, several independent companies have entered these markets, and the Regional Companies now seek to penetrate them as well. However, as will be seen, the shared tenant services at issue in this motion are interexchange services, and the local companies are therefore prohibited by the decree from providing them.

A. *Regional Company Contentions*

The Regional Companies concede that the proposed activities are in the gray area of an "overlap" between exchange and interexchange activities,[33] but they go on to argue that where this is the case, the decree permits them to engage in all of the activities involved in the overlapping areas, both exchange and interexchange.[34]

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interexchange services at lower, volume-based prices. Tenants may also have available to them a broader range of products and services than would be true otherwise. See generally, Ameritech Motion to Provide Shared Tenant Services, Exhibit A, at 4-5.

[33] US West takes the position that the proposed activities are neither interexchange in character nor in a gray or overlap area but constitute exchange functions. Comments of US West to Ameritech Motion to Provide Shared Tenant Services at 10-17. There is no validity whatever to that contention. The US West argument proceeds on the basis of two premises: (1) that all telecommunications functions performed within an exchange area are exchange services except only those which actually cross exchange boundaries, and (2) that "interexchange telecommunications" and "interexchange telecommunications services" represent identical concepts. For the reasons discussed in the text below, both of these premises are erroneous.

The only other Regional Company to file a memorandum on this issue (Southwestern Bell) supports Ameritech. Oppositions were filed by AT & T, MCI, TDX Systems, Inc., the North American Telecommunications Association (NATA), MTTA, and the Department of Justice. Sharetech (a partnership consisting of United Technologies Building Systems Company and AT & T Information Systems) initially filed comments opposing the Ameritech motion but subsequently withdrew these comments.

[34] Ameritech Memorandum in Support of Motion to Provide Shared Tenant Services at 2-14, 15-16.

That reasoning is erroneous if only because it proves too much. The very nature of modern telecommunications requires the two functionally distinct systems to meet: access to interexchange services is obtained through the local exchange provider and both use the same equipment.[35]

The overlap is thus inherent in the technology,[36] and to cede the area it covers to the Regional Companies would allow them to enter the interexchange market by the back door on a wholesale basis[37] when their front-door entry into that market is prohibited by the most basic provisions of the decree. See Section II(D)(1) of the decree which provides, without exception or ambiguity, that "[a]fter completion of the reorganization . . . no [Operating Company] shall . . . provide interexchange

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[35] In fact, the "exchange access," over which the Operating Companies have jurisdiction, is defined in section IV(F) of the decree "as the provision of exchange services for the purpose of originating or terminating interexchange telecommunications."

[36] The division between exchange and interexchange services is fundamental, representing a line of certainty in an otherwise volatile and rapidly developing industry. A grant of Ameritech's motion would introduce the kind of uncertainty into the system that could be used by the Regional Companies to advance ever deeper into the interexchange business even as they retain their local monopolies. See note 25, *supra*; pp. 1097-98 *infra*; and see, Response of NATA to Ameritech Motion to Provide Shared Tenant Services at 3.

[37] Ameritech goes so far as to assert that, since "[c]oordination between exchange and interexchange services is essential to prevent degradation of service," and since "[c]oordination between CPE and interexchange services is also vital," the Regional Companies must be allowed to operate over the entire range of the overlap (Memorandum at 17), lest they be "imprison[ed] . . . in a narrow, unworkable range of activities, threatening their competitive viability in their permitted lines of business" (Memorandum at 17-18). If this line of argument were to prevail, it would completely undermine the prohibitions of the decree.

telecommunications services . . . ." In short, the "overlap" argument entirely lacks merit.

B. *Shared Tenant Services Are Interexchange Services*

There is an even more fundamental reason why the requests of the Regional Companies must be rejected—one that relates to the kinds of activities that are subsumed under the rubric of shared tenant services.

Both from the point of view of the statutory language and from that of the purpose of the decree, the prohibitions in section II(D) restrict the Operating Companies not merely from providing transmissions from a point in one exchange area to a point in a different exchange area but also from engaging in activities that comprise the business of providing interexchange services.

If the decree had been intended to restrict the local companies only from the interexchange transmissions themselves, a prohibition on the provision of "interexchange telecommunications" would have been entirely adequate. But the decree goes further to prohibit these companies in section II(D)(1) from providing "interexchange telecommunications *services*." The term "services" obviously has, and it must be accorded, meaning and, as will now be seen, that meaning is far broader than is implied by the construction of the statute advocated by the Regional Companies.

We begin with the obvious. The Operating Companies are excluded from the provision of interexchange services in order to prevent them from becoming competitors of the interexchange carriers. See Part I, *supra*. On this basis, many of the arguments advanced by the Regional Companies—designed to demonstrate that there is little likelihood of their steering the shared tenant customers to one interexchange carrier rather than an-

other[38]—are largely beside the point,[39] for they fail to address the principal problem to which section II(D)(1) of the decree is addressed: *the threat of competition by the Regional Companies themselves in the interexchange business.*

Interexchange transmission capacity is transformed into an interexchange service that can be offered for hire,[40] *i.e.*, an interexchange business, by the performance of functions that are normally and necessarily performed by those who are engaged in that business (and who would therefore be competing with the Regional Companies with respect to these functions if the motion were granted). The issue of what constitutes an interexchange service or business is most usefully con-

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[38] See Ameritech Motion to Provide Shared Tenant Services at 21.

[39] That is not to say that the ability and the incentive of the Companies to cooperate with particular interexchange carriers and to favor them in various ways is not a problem in terms of local company participation in shared tenant activities. Even though a particular Regional Company might not be directly selecting a certain interexchange carrier, it would be a simple task so to perform the traffic analysis and so to arrange the marketing that the carrier favored by the Regional Company would emerge as the ultimate selection. Further, the Regional Company would in any event be marketing a telecommunications package that included interexchange services—a fact that would give the company a strong incentive so to manipulate the switching and the priorities that the interexchange carrier selected for the shared system would prevail over competing carriers.

Moreover, the success of a developer's offering of a shared system would depend in significant part upon the success of the Regional Company in "selling" to the tenants the interexchange services included in the automatic carrier selection service. Thus, even if the Regional Company did not itself select the interexchange carrier, once it began marketing the package, it would have a direct financial interest in ensuring that a particular mix of carrier—those offered by the developer in conjunction with the Regional Company —was selected.

[40] See section IV(P) of the decree.

sidered in the context of what Regional Companies would be doing with respect to shared tenant services in the event the motion were granted and to compare these activities with the activities of interexchange enterprises.

First. The Regional Companies would, at a minimum, be aggregating demand within a building and purchasing bulk interexchange services based on that demand for resale to the end users, *i.e.*, the tenants.[41] The purchase of *interexchange* capacity on a wholesale basis (*i.e.*, at prices that reflect total demand in a particular context) and its sale at retail clearly constitutes the provision of interexchange services under the decree.[42] Those engaged in such an activity are referred to as resellers, that is, interexchange providers.[43]

If the Regional Companies performed such an activity, that is, if they purchased interexchange services at a bulk price based on the demand in a particular building

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[41] To be sure, Ameritech argues that such aggregation of demand by the Regional Companies allows tenants to obtain CPE, exchange, and interexchange services at lower, volume-based prices than their individual demand would justify. That may well be true, but Ameritech does not discuss the alternative: that entities other than monopoly exchange providers would perform this service for tenants, and that they, too, could do so at volume-based prices. However, the important fact for present purposes is that aggregation and resale constitute interexchange business activities.

[42] The aggregation and resale function is crucial to the success of a shared tenant services enterprise. See Ameritech Motion to Provide Shared Tenant Services at 5, 8, 21; see also, Bell Atlantic Reply at 9, 10-11; US West Response at 8; see also, the statement of Ameritech's Indiana Bell Communications subsidiary which described a shared tenant service as a "resale of long distance" (July 27, 1984 presentation on Multi-Tenant Services in Indiana). Department of Justice Memorandum of August 27, 1984, Appendix B.

[43] Many of the companies engaged in the interexchange telecommunications business do not own transmission facilities but are resellers. Resellers are considered common carriers by the FCC. See Competitive Common Carrier Service, Second Report and Order, 91 F.C.C.2d 59 (1982), on reconsideration, 93 F.C.C.2d 54 (1983).

and then sold such services at retail at higher prices to the building's tenants—they, too, would be resellers in the interexchange business, and they would be in direct competition with other resellers and with facilities-based interexchange carriers.

Second. The Regional Companies expect to perform these functions by making selections of interexchange capacity on what they deem the lowest-cost basis [44] and by marketing the services thus assembled.

Given the existing technology and the economics of the interexchange business, the selection process is exceedingly complex, involving many variables.[45] Both facilities-based carriers and resellers market their services based on comparisons of their particular rates, or mix of rates, with the rates of their competitors in the interexchange business, in efforts thereby to persuade the ultimate users to purchase their services rather than those of other interexchange providers.

These marketing features are also integral to the shared tenant services plan of the Regional Companies, and these companies would thus be directly competing with the legitimate interexchange providers through their own rate comparisons. One example of such a rate comparison already in being is a promotional brochure published by the provider of shared telecommunications services to the World Trade Center building in New York City soliciting potential subscribers among the

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[44] Ameritech Motion to Provide Shared Tenant Services at 19, 21.

[45] Facilities-based interexchange carriers, such as AT & T and MCI, provide interexchange services through many offerings with differing rates, from high-priced ordinary MTS service, through discount WATS service, to even lower-priced dedicated network and other bulk rate services. Special rates may be offered to customers depending upon the volume of their business, and the cost of the service may further vary depending upon the time of day, the route, the relative occupancy of the circuits and switches, and other factors.

building tenants by comparing its offerings against the offerings of other providers and by comparing its rates directly with those of AT & T, MCI, and Sprint.[46]

Third. The Regional Companies would not only be purchasing and marketing interexchange services, they would also be selecting carriers for their customers and procuring additional interexchange services for them.

In connection with the phase-in of equal access,[47] the interexchange carriers are undertaking elaborate and expensive campaigns, through the media and otherwise, to induce individual customers to presubscribe to their particular services. The cooperation of the Operating Companies is an essential element in that effort [48] to bring about free and fair competition among the various interexchange carriers,[49] and the Operating Companies are even "expected to assist the interexchange carriers by

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[46] Department of Justice Memorandum of August 27, 1984, Appendix D. It may be expected that a prospective customer of a shared tenant services system would compare the cost of the Regional Company package with the cost of bulk rates offered by a single interexchange carrier or perhaps a package of shared tenant services offered by a joint or cooperative venture of interexchange carriers. In that situation, there could be no question that the customer would be choosing interexchange services between competing businesses, and that the Regional Company managing its shared tenant service would have every incentive to did whatever it could to ensure that the customer chose its system. See, *e.g.*, pp. 1102-03 *infra*.

[47] Appendix B of the decree. *United States v. AT & T*, *supra*, 552 F.Supp. at 232-34.

[48] The purpose of this effort is to effect a change-over from the AT & T de facto monopoly to a competitive interexchange market.

[49] See generally, *United States v. Western Electric Co.*, 578 F.Supp. 668, 677 (D.D.C. 1983). The Federal Communications Commission has since modified the mechanics of the presubscription process. See generally, *Investigation of Access and Divestiture Related Tariffs*, 50 Fed.Reg. 24982 *et seq.* (June 24, 1985).

means of such measures as making lists of non-presubscribed customers available to them." [50]

An analysis of the shared tenant services proposal of the Regional Companies indicates that they expect to stand this presubscription process on its head. Instead of assisting the interexchange providers in their efforts to "sign up" interexchange customers, the Regional Companies are seeking to offer a presubscription option of their own. If the Ameritech motion were granted, the tenant-customers would be expected to subscribe not to a legitimate interexchange carrier but to the Regional Companies, and those companies, in turn, would make the arrangements for choosing the interexchange services and options to serve those customers.

Here again it is clear that the functions involved—the selection of carriers and the procurement of interexchange services—constitute integral part of the interexchange business, and that, by performing these functions, the Regional Companies would be directly competing with the interexchange carriers for that business.[51]

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[50] *United States v. Western Electric Co., supra*, 578 F.Supp. at 676 note 41.

[51] As the Department of Justice has pointed out, the existing prohibition on the selection of interexchange carriers by the Regional Companies does not mean that these companies may not coordinate with such carriers in the installation of interexchange services independently selected and procured by a customer, or that they may not coordinate the testing and repair of interexchange services where they provide the CPE or the exchange access facilities that are links in such services. Memorandum of August 27, 1984 at 29.

Indeed, in order to minimize legitimate complaints from the public about poor coordination between local and interexchange carriers with respect to repair of equipment and otherwise, the Regional Companies should undertake such tasks. To the extent that they may have refrained from doing so in the past as a means of control of these markets, including the interexchange market, this Opinion may induce them hereafter to cooperate more fully with other telecommunications service providers in good faith.

Fourth. The Regional Companies would be performing the interexchange switching and routing function, which takes calls from customers and directs them to their destination. That function would be performed by these companies in lieu of its performance by an inteexchange carrier, particularly where the calls would not simply be routed to a particular carrier but to a particular service of a carrier, such as a private line.[52]

However, the switching and routing functions quite obviously constitute key parts of the interexchange business, and the Regional Company activities in that regard would be performed in direct competition with the interexchange carriers in the interexchange business.

In addition to the general threat arising from the Regional Companies' monopoly there is a special threat to fair competition by these kinds of activities, for at least two reasons. In the first place, a Regional Company, unlike any other competitor, could use its market power in the provision of exchange access[53] to maximize the interexchange carriers' costs with respect to such access while minimizing the rates paid for interexchange services by its own shared services enterprise. Furthermore, a Regional Company, again unlike any other interexchange competitor, could use its control over exchange access to become the dominant purchaser of interexchange services in its region, thereby further to establish its dominance with respect to interexchange rates and hence with respect to the interexchange market.

C. *Potential for Expansion*

All these problems are further exacerbated by the virtually unlimited potential in the event of a grant of

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[52] For example, a Regional Company could direct an interexchange call from City Y to City X by switching it with the City Y exchange area to a private line ending in City X. See also, note 45, *supra*.

[53] The Regional Companies presently have a monopoly with respect to exchange access. See section II(D)(3) of the decree.

the Regional Company request and the absence of a logical stopping point.

As presently framed, the Ameritech motion is restricted to shared services involving only tenants in a particular building. However, neither principle nor technology require such a limitation.[54] Just as it is aggregating the demands of the tenants in a particular building, a Regional Company could as easily aggregate demand with respect to a group of buildings, a section of a city, certain types of businesses, or even among all subscribers to its central office switch.[55] Having done so, it could offer interexchange services to all such subscribers on the same basis as those services would initially be offered to tenants in one building.

What would thus be likely to happen is that, in relatively short order, the Regional Companies would become the purchasers of interexchange services for all the telephone subscribers in their exchange area, leaving to the interexchange carriers only the role of providers of leased facilities for integrated interexchange services marketed and offered by the Regional Companies.

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[54] As discussed above in note 25, the Regional Companies not infrequently seek to carry limited precedents to unintended extremes. In this particular instance, they could enlarge the permitted area with considerable justification, given the breadth of the principle that would be established by a grant of the Ameritech motion.

[55] According to the Department of Justice, in negotiations with Ameritech that company indicated that shared switching arrangements might be offered to commonly-owned buildings throughout an exchange area, to a single business with multiple locations, or to an organization composed of multiple users (*e.g.*, a bank clearing house on behalf of all of its member banks). As the Department correctly points out, an arrangement under which a Regional Company provided interexchange services to multiple users at diverse locations from a centrally located switch would be an exact reconstruction at the regional level of the pre-divestiture structure of the Bell System. Department of Justice Memorandum of June 29, 1984 at 27-28.

That this scenario is not an implausible one is demonstrated by Ameritech's own submission to the Court. In one of its memoranda,[56] Ameritech states:

> Shared-services arrangements can also be provided for building complexes, such as a university campus or an office park. In addition, large individual businesses and institutions may have some of the same economies of scale and centralized management advantages as shared systems because of their heavy usage of telecommunications and related products and services. If desired by these individual customers, Ameritech would provide equivalent packages of products and services.

Whatever one might think of the desirability of such an arrangement in the abstract, it is apparent that, given the historical experience with manipulation and discrimination by those in control of monopoly bottlenecks in the telecommunications market, it is not one to be repeated in slightly different form. See Part I, *supra*. In any event, such a development would be clearly violative of the decree.

D. *Marketing of Customer Premises Equipment*

As part of their arguments in support of the motion, the Regional Companies complain that, should they not be permitted to engage in the desired activities, they would have difficulty selling CPE,[57] a market from which they are not foreclosed by the decree.[58] For the reasons

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[56] Memorandum of March 23, 1984 at 3-4, n.*.

[57] Ameritech Motion to Provide Shared Tenant Services at 5, 8-9, 15; US West Comments in Support of Ameritech's Motion to Provide Shared Tenant Services at 8-10.

[58] Similar arguments are advanced by the Regional Companies in support of the other motions before the Court. As explained in Part IV, if these arguments were accepted as valid, they would

cited above, even if this were true,[59] it would be insufficient to override the direct prohibitions in the decree. But the CPE argument is not persuasive in any event.

The most the Regional Companies could hope for in this context would be the striking by the Court of some kind of balance. On one side of that balance would be the assumed possibility that, because of their absence from the shared tenant services market, the Regional Companies would find it marginally more difficult to market some kinds of CPE. This difficulty, in turn, could in theory have two adverse effects: it could reduce the income and profits of these companies, and it could reduce competition in the CPE market.

When these assumed effects are analyzed, however, they are seen to have little weight. Judged by any yardstick, the Regional Companies appear to be doing exceedingly well: their income, profits, and dividends have been rising steadily, and they are prospering probably beyond their own expectations—certainly beyond the expectations of financial analysts who contemplated their future course at the time of the breakup.[60] The short of it is that the companies do not urgently need the additional income that could be generated by their entry into the prohibited markets.

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result in a wholesale entry of the Regional Companies into prohibited businesses, all on the premises that this was necessary to protect their legitimate business enterprises. See pp. 53-54 *infra*.

[59] According to some, the opposite is true. MCI contends that the markets for shared tenant services and for CPE are entirely different. MCI Opposition to Ameritech's Shared Tenant Motion at 5. Further, MTTA states that independent competitors are significantly disadvantaged in the sale of both CPE and shared tenant services when compared with Regional Companies. MTTA Comments at 6. Only a record compiled in the context of an application for a decree modification or for a waiver could reveal which of these assertions is correct.

[60] See, *e.g.*, *Financial World*, Jan. 7, 1986 at 57; *New York Times*, November 29, 1985, Section D at 6.

The second prong of the companies' argument is equally weak. The information services market is hardly a monopoly market: a number of corporations engage in this business, both large and small, and the entry of the Regional Companies is not needed to make it a competitive one.

That is not to say that there would be *no* advantages flowing from the companies' entry into this market; but any such positive developments must be measured against the dangers. As elaborated on above, and as the several successful lawsuits against the old Bell System confirm, there is a serious danger that, when a company mixes both monopoly and competitive enterprises in closely related fields of business, the twin perils of discrimination and cross-subsidization are ever present. It is, of course, for that very reason that the decree prohibits such mixing (see Part I, *supra*) and for that reason, too, the CPE business may not be used as a springboard for opening the door to markets which are closed to the Regional Companies by the decree.

For the reasons stated, the Court rejects the request that the decree be "clarified" to permit that which, absent a modification or a waiver, it plainly prohibits. The Ameritech motion will therefore be denied.

III

Exchange Telecommunications Outside Regions

Three of the motions raise the same issue [61]—whether the decree permits the Operating Companies to provide

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[61] Ameritech's motion for clarification of the decree regarding the provision of cellular radio services outside the Ameritech region; the motion of Pacific Telesis group for a declaratory ruling that it may provide exchange telecommunications outside of California and Nevada; and the motion of NewVector Communications, Inc., a subsidiary of US West, for a ruling that NewVector's provision of

cellular exchange radio services outside the area served by Operating Companies owned by US West is authorized under the decree. These three motions thus raise similar issues with respect to the interpretation of the decree.

Despite this similarity, US West has insisted that both its views and those of its subsidiary NewVector cannot be properly presented unless each is allowed oral argument through its own counsel. NewVector Motion to Participate in Oral Argument at 6-7; US West Statement of August 14, 1985 at 1. The point is totally without merit.

NewVector has filed a twenty-two page memorandum in support of its motion; a twelve page reply to responses made to the Ameritech motion, with thirty pages of attachments; a seven page reply to responses to its own motion, and an eight page motion requesting leave to participate in the oral hearing, which reiterates the substantive position stated in the other memoranda. US West has filed an eighteen page memorandum in support of Ameritech's motion for shared tenant services with five pages of attachments; a twenty page reply to comments made on that motion; and a seventeen page post-hearing statement—all on the same subject and with reasoning similar or identical to the NewVector submissions. Indeed, the various Regional Companies and their subsidiaries have filed a total of twenty-seven memoranda on the pending motions, all making essentially the same points.

As the Court has noted in the past, all motions and written memoranda and comments are carefully scrutinized on their own merits, and of course it has done so here. The Court schedules oral argument when it concludes that such argument may serve a useful purpose in clarifying issues discussed in the memoranda. See also, Rule 1-9(g) of the Local Rules of this Court. Where, as here, the Regional Companies are arguing from substantially the same legal position and have exhaustively briefed the issues, it would be a waste of the time of Court and counsel to permit each company to argue separately, and the Court has declined to do so here (just as has done in the past). The current motions were argued in support of the Regional Company positions by counsel for Ameritech and counsel for Pacific Telesis, in conformity with selections made by the Regional Companies themselves. Counsel for the United States and for MCI argued in rebuttal, with a brief oral comment from counsel for AT & T.

There is thus no basis for the US West insistence that it should have been heard through oral argument, let alone for its complaint that it had found it "discomforting to be precluded from oral argument while a non-party, MCI," was invited to present its views.

exchange telecommunications services outside their particular exchange areas.[62] While the immediate impetus for these requests is the interest of some of the Regional Companies in competing on a nationwide basis in the cellular radio market, the scope of the motions is far broader: it encompasses all exchange telecommunications services.[63] The Court holds that, absent a waiver, each Operating Company may under the decree provide exchange telecommunications services, including cellular radio services, only within its own exchange area.

Section II(D) of the decree prohibits the Operating Companies from providing any product or service other than exchange telecommunications services and exchange access.[64] The Regional Companies subscribing to the motions argue[65] that the service they are proposing to

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US West Statement of August 14, 1985 at 1. MCI was allowed to argue orally because, in addition to the Department of Justice, it was the principal opponent of the requests made by the seven Regional Companies. The Court has no intention of complying with the request implicit in US West's complaint that it entertain oral argument from the seven Regional Companies and their subsidiaries and affiliates while precluding a response from those "non-parties," *i.e.*, intervenors, which are affected by the various Regional Company requests.

[62] Indeed, the claim is that the Regional Companies may provide this intra-LATA service outside their own regions.

[63] See, *e.g.*, NewVector Motion to Provide Cellular Service Outside of Region at 5 n. 10.

[64] Also listed in the decree is any other service "that is not a natural monopoly service actually regulated by tariff." Section II(D)(3).

[65] Some of the arguments made by the Regional Companies on this issue are actually couched in waiver, not clarification, terms (NewVector Memorandum at 12) ("cellular radio . . . should not be unnecessarily restricted"), or they are totally irrelevant (NewVector Memorandum at 19-21) (contending that the consent decree approved by the Court in a different case—*United States v. GTE*—somehow supports the request for clarification of the decree in this case).

perform constitutes exchange telecommunications, and that for purposes of the decree it is irrelevant that this service would be provided outside the exchange areas—inherited by the particular Operating Companies by virtue of the decree. However, it is clear for a number of reasons that the Operating Companies were intended to be limited to their own local areas in furnishing exchange telecommunications services.[66]

First. Section IV(G) of the decree defines the nature of the exchange areas as being strictly local by mandating their establishment in accordance with a number of criteria, all of them of a local character.[67] Under the same section, the responsibility for establishing each exchange area is that of the Operating Company servicing the particular area—a provision that supports the con-

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[66] The Court has previously held that the prohibition on mobile radio services which cross exchange area boundaries may be removed only through a waiver proceeding. *United States v. Western Electric Co., supra,* 578 F.Supp. at 645-46; see also, *United States v. Western Electric Co., supra,* 604 F.Supp. at 256 *et seq.*

[67] Section IV(G) provides that "exchange area" or "exchange" means a geographic area established by an Operating Company in accordance with the following criteria:

1. any such area shall encompass one or more contiguous local exchange areas serving common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries;

2. every point served by a BOC within a State shall be included within an exchange area;

3. no such area which includes part or all of one standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States), shall include a substantial part of any other standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States), unless the Court shall otherwise allow; and

4. except with the approval of the Court, no exchange area located in one State shall include any point located within another State.

clusion that these companies were not intended to provide exchange services outside their own territorial limits. Likewise, section II(D)(3) of the decree authorizes the Operating Companies to provide, in addition to exchange telecommunications and exchange access service, other natural monopoly services "actually regulated by tariff," again indicating that the decree contemplates the provision by an Operating Company of services under that section only in the area in which it is regulated by tariff; *i.e.*, its "home" area.

Second. The parties' submissions and the Court's decisions with respect to the appropriate size of the exchange areas were based on factors relating solely to the status of the "home" Operating Company [68]—a definitional process that would have been largely devoid of meaning if the Operating Companies had been intended to have nationwide reach with respect to exchange areas.

Similar reasoning was applied to the Bell System's assets. To the extent that they were not awarded to AT & T, these assets were divided among the local companies on the basis of the principle that each Operating Company would provide telecommunications services only in the exchange areas in which it was the dominant telecommunications provider.

Third. When describing the structural changes that would take place following the separation of the Operating Companies from AT & T, the Court stated in the Opinion which approved and explained the decree that "[t]he geographic area for which these Operating Companies would provide local telephone service is defined in the proposed decree by a new unit, the 'exchange area'," [69] and in the Opinion which approved the Plan of

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[68] *United States v. Western Electric Co., supra,* 569 F.Supp. at 995-97.

[69] *United States v. AT & T, supra,* 552 F.Supp. at 141. See generally, *United States v. ITT Continental Baking Co.,* 420 U.S. 223, 238, 95 S.Ct. 926, 935, 43 L.Ed.2d 148 (1975).

Reorganization that "[w]ith respect to exchange telecommunications . . . the Operating Companies and the Regional Companies [are] by definition . . . limited to clearly defined geographic areas." [70] Further, in comparing the Bell System before divestiture to the telecommunications industry as it would exist after divestiture, the Court noted that:

> The Bell System is a vast, vertically integrated company which dominates local telecommunications, intercity telecommunications, telecommunications research, and the production and marketing of equipment. Each of the divested Operating Companies will have a monopoly in only one geographic portion of one of these markets—local telecommunications.[71]

Fourth. The regional and local companies themselves have repeatedly espoused the view that the scope and character of their exchange operations were to be geographically limited. Thus, on May 25, 1983, the Associated Bell System Companies stated in a filing before the Federal Communications Commission that "[n]one of the divested [Operating Companies or Regional Companies] will have control over exchange facilities on a broad national basis. No [Regional Company] will have more

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[70] *United States v. Western Electric Co., supra,* 569 F.Supp. at 1081.

[71] 552 F.Supp. at 187. The Court thereafter consistently adhered to these interpretations. For example, in deciding that the decree did not permit the Operating Companies to provide "any and all mobile radio services without regard to LATA boundaries," it noted that this proposal would permit telephone users to route long distance calls over either the landline interexchange networks or over a mobile radio system, "thus in effect overriding on a large scale the decree's limitations on the territorial reach of the Operating Companies. Such a development would have been entirely inconsistent with the terms and purposes of the decree, and the Court would not have authorized it." *United States v. Western Electric Co., supra,* 578 F.Supp. at 647.

than regional ownership of such facilities. . . ." [72] Similar statements were made by individual Operating Companies, including a statement subscribed by several of them that "[u]nder the AT & T Plan of Reorganization (POR), approved by the Department of Justice and the Divestiture Court, the Bell System has been divided both geographically and functionally. Each divested BOC will serve a territory which is sharply confined." [73]

The oft-repeated assertion of the local companies that they are geographically limited was adopted by the FCC in a Report and Order which stated that "[a]t least with respect to the provision of exchange telecommunications services, exchange access and information service access, the [Regional Companies] will operate only within their own geographic territories. The [decree] does not prohibit the [Operating Companies] from offering CPE outside the geographic area in which they provide exchange telecommunications services." [74]

In the face of the statements made to and by their federal regulatory body, the Court finds disingenuous the

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[72] Reply Comments of Associated Bell System Companies, before the Federal Communications Commission in the matter of Policy and Rules concerning the furnishing of customer premises equipment, enhanced services and cellular communications services by the Bell Operating Companies, CC Docket No. 83-115 (May 25, 1983) at 13 (footnotes omitted).

[73] Joint Petition for Reconsideration of Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, the Ohio Bell Telephone Company, before the Federal Communications Commission in the matter of Policy and Rules concerning the furnishing of customer premises equipment, enhanced services and cellular communications services by the Bell Operating Companies, CC Docket No. 83-115 (February 10, 1984) at 13. See also Reply Comments of Associated Bell System Companies before the FCC, *supra*, at 13-18.

[74] 49 Fed.Reg. 1190, 1192 (January 10, 1984).

present claims of these companies: They have always clearly shared the understanding of the Court that, with respect to exchange services, they were to be strictly local entities, not national corporations providing such services everywhere.

Fifth. Even arguments advanced here by the Regional Companies support this construction. Ameritech and others cite the fact that they are not limited to prescribed geographical territories with respect to the provision of directory advertising or customer premises equipment.[75] But these activities are permitted to the local companies on an unlimited geographic basis by an amendment of the consent decree.[76] Thus, the directory advertising and CPE marketing exemptions, rather than buttressing the position of the Regional Companies, undercut it: If a special amendment to the decree was required to allow them to engage in these enterprises on such a basis, they can hardly be deemed to be free to engage in other "outside" ventures without a similar amendment (or a waiver of the line of business restrictions).[77]

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[75] Ameritech Motion to Provide Cellular Service Outside of Region at 5; Ameritech Reply Memorandum at 8; NYNEX Comments at 2 note **.

[76] Sections VIII(A), (B) of the decree.

[77] Likewise, to the extent that the Regional Companies are providing cellular radio to areas that do not correspond exactly to exchange boundaries (*e.g.*, New York-northern New Jersey) or that one of them is participating in the provision of cellular services in the Gulf of Mexico, they do so only pursuant to waivers, not as of right (*United States v. Western Electric Co., supra*, 578 F.Supp. at 647-49); *United States v. Western Electric Co., supra*, 604 F. Supp. at 263-64), and they have never previously claimed that they could do so as of right.

The Regional Companies argue that the Plan of Reorganization contemplated that they would engage in extraregional cellular

Sixth. The local companies have reaped substantial benefits from the interpretations they now seek to disavow. For example, in denying the Department of Justice's motion for reconsideration of the Court's ruling permitting the Operating Companies to market customer premises equipment, the Court noted that these companies

> will be relatively small, geographically dispersed corporations. They will be limited to a narrow range of products and services, . . . [and they] will also lack the ability to use various components and affiliates in the pursuit and concealment of anticompetitive conduct.[78]

Seventh. The conclusion that the local companies may not engage in exchange telecommunications outside their own areas is also supported by policy underlying the decree. In order to maintain a stable and effective national telecommunications network, the local companies must work cooperatively in many areas. Together they play an important role in the support of national security and

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operations because a footnote in the Plan (note 386 in Part II(A)(3)(b)(ii)) states that some cellular systems might be owned by joint ventures of Regional Companies in areas that do not necessarily correspond to the companies' regions. This statement, however, occurs in a section of the Plan concerned only with effecting the transfer of AT & T's assets to the Operating Companies, and it was thus referring only to a particular type of ownership arrangement which might be necessary to effectuate that transfer. In context, the footnote does not support the Regional Companies' argument, particularly since these joint ventures were eventually not necessary to effectuate the divestiture. In any event, nothing in the Plan indicates that the Regional Companies would not have had to obtain waivers prior to entering into a joint venture arrangement.

[78] *United States v. AT & T*, 1982-2 Trade Cases 64,980 (CCH 1982); see also, *United States v. Western Electric Co., supra*, 592 F.Supp. at 852 n. 8.

emergency preparedness functions, and they participate in the establishment of national network standards.[79] Competition among these companies with respect to exchange service could, and no doubt in short order would, reduce their incentive to cooperate in these vital areas and thus jeopardize both the quality of the services provided by the national telecommunications network as well as the national defense and emergency requirements of that network.

Eighth. The Regional Companies argue at great length that their entry into the cellular markets on a nationwide scale would not be anticompetitive but would promote competition.[80] However, even without the involvement of the Operating Companies in each others' exchange telecommunications, competition may be expected to flourish in the exchange areas as technology and economics render such competition by independent, non-monopoly competitors feasible.

In any event, to the extent that this argument has any validity, it should be made in support of an application for a waiver pursuant to section VIII(C) of the decree, not a request for clarification. This distinction is not a mere technicality. The grant of waivers may be conditioned by the Court upon provisions designed to protect competition. As applied to waiver applications for cellular operations, the Court might, for example, wish to explore the issue of the provision of "roaming" services

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[79] See *United States v. AT & T, supra,* 552 F.Supp. at 208-09; *United States v. Western Electric Co., supra,* 569 F.Supp. at 1113-14, 1118.

[80] See, *e.g.*, Ameritech Motion to Provide Cellular Service Outside of Region at 3, 13; Ameritech Reply in Support of Motion at 3-4; Southwestern Bell Memorandum in Support of Ameritech's Motion to Provide Cellular Service Outside of Region at 7-8.

to Regional Company customers [81] or the possibility that these companies could make use of the cellular footholds to construct national cellular service network or an official services networks,[82] and to attach appropriate conditions depending upon the results of the inquiry. If the decree were "clarified" to permit Regional Company entry into the cellular market on a nationwide scale, no such inquiries could be conducted and no necessary safeguards could be attached.

The response of the Regional Companies that waiver proceedings are unnecessary because "there is no conceivable threat to competition," [83] that they "would unnecessarily preoccupy the Court and the parties," [84] and that the dangers are "speculative," [85] are unsatisfactory, for they assume what only such proceedings can supply: the answer to the question, in accordance with section VIII(C) of the decree, whether competition could be impeded by these companies in the market they seek to enter.

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[81] Roaming is the ability of a cellular subscriber in one system to obtain cellular services in another system. Absent an arrangement between the customer's "home" cellular service provider and the provider in another cellular system, roaming may be either impossible or at least more expensive. Regional Companies may enjoy a competitive advantage in this regard because of the regional character of their monopoly wireline operations.

[82] See Response of Telocator Network of Ameritech's Motion to Provide Cellular Services Outside of Region at 6-9; MCI Opposition to Ameritech's Motion to Provide Cellular Services Outside of Region at 6.

[83] Ameritech's Reply in Support of Motion to Provide Cellular Services Outside of Region at 13.

[84] NewVector Motion to Provide Cellular Services Outside of Region at 4.

[85] NewVector Reply to Responses to Ameritech's Motion to Provide Cellular Service Outside of Region at 8.

For the reasons stated, the Court will not approve the "clarification" of the decree the Regional Companies request,[86] and the motions will be denied.[87]

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[86] By a letter dated December 19, 1985, Ameritech asserts that, in a motion filed on December 9, 1985, for a waiver of the decree regarding the application of Pacific Telesis to provide certain mobile radio services, the Department of Justice agreed with Ameritech's substantive arguments regarding the instant motion except only as to the necessity of a waiver. The Ameritech submission does not cause a change in the Court's decision announced herein, for several reasons.

In the first place, Ameritech has stated its position in a letter rather by a motion as required under the Rules, and in contravention of the Court's Memorandum dated September 27, 1983. In accordance with that Memorandum, the Court declines to grant leave to file the December 19 letter but has ordered the Clerk to return it to its author. Further, while the Court gives substantial weight to the position of the Department of Justice (see *United States v. Western Electric Co., supra*, 604 F.Supp. at 262; see also, 592 F.Supp. at 873), the responsibility for interpreting the decree is the Court's, not the Department's, and the Department's views, although always regarded as persuasive, are not binding on the Court. Finally, Ameritech's own memorandum interprets the Department of Justice's position to be that the decree does not permit the Regional Companies to provide cellular service outside the appropriate exchange areas or to provide voice storage service in their cellular networks without a waiver. Ameritech Motion to Provide Cellular Services Outside of Region at 2-3.

[87] There is a suggestion in several of the papers submitted to the Court that some Operating Companies may be engaged in the cellular business outside their own exchange areas without having secured the necessary waivers. See, *e.g.*, Ameritech Reply Memorandum at 8-9; Pacific Telesis Memorandum in Support of Pacific Telesis' Motion at 9; Bell Atlantic Motion to Provide Cellular Services Outside of Region at 2. To the extent that this is so, the offending companies must, of course, cease such operations forthwith. Furthermore, the Court herewith requests the Department of Justice to investigate whether such violations have occurred, and if the answer is in the affirmance, to recommend appropriate sanctions to the Court. See sections V, VI, and VII of the decree.

IV

Voice Storage

Ameritech [88] has also moved for an order declaring that the decree permits it to provide voice storage and retrieval features in conjunction with the provision of cellular radio services.[89] The issues presented by this motion are in some respects an amalgam of the questions discussed in Parts II and III above: as they do with respect to shared tenant services, the Regional Companies claim that they are not prohibited from engaging in the voice storage and retrieval business as such; and, as they assert with respect to the cellular services, they argue that they are free to provide voice storage and retrieval services outside their own regions.

Section II(D)(1) of the decree unambiguously states that "no [Operating Company] shall, directly or through any affiliated enterprise . . . provide . . . information services." Information services are defined in section IV(J) as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications. . . ." [90] As Ameritech

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[88] Ameritech's motion is supported by NYNEX, BellSouth, and Southwestern Bell.

[89] Ameritech defines voice storage as an optional feature that enables a cellular subscriber to store, retrieve, and send messages when his cellular telephone is busy or unattended. Ameritech Motion to Provide Voice Storage at 16.

[90] An exception exists with respect to the "use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." Section IV(J) of the decree.

itself has recognized[91] voice storage and retrieval services fall squarely within this definition.[92]

Since voice storage is an information service, and since the Regional Companies are clearly prohibited from providing any information service, there is no basis for a clarification motion: no "clarification" of the decree could change those basic facts, and the motion could appropriately be denied on that basis alone.

What Ameritech is really seeking, it would seem, is an order to remove the information restriction in section II(D). However, that result can be achieved only by a request for modification[93] which might require compliance with the standard established by such decisions as *United States v. Armour & Co.*, 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971), or by a motion for a waiver which makes the showing required by section VIII(C)—a motion which Ameritech has chosen not to file.

Notwithstanding these considerations, the Regional Companies contend that they may legitimately market voice storage and retrieval services without either a mod-

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[91] Ameritech's Motion to Provide Voice Storage refers to the service as being encompassed within the "information services prohibition." Memorandum at 9. Further, Ameritech's counsel conceded at oral argument that, were the services provided in connection with the landline network, their offering by a Regional Company would be prohibited by the decree. Transcript of hearing of August 9, 1985 at 46.

[92] In fact, the Justice Department's Competitive Impact Statement used voice storage as an example of the kind of information service that would be prohibited under the decree. Competitive Impact Statement, *supra*, 47 Fed.Reg. at 7176.

[93] US West, for one, appears to recognize that fact (US West Statement of August 14, 1985 at 16), and, implicitly, so does Ameritech when it requests that the Court "reverse the possible competitive [sic] effect of the information services prohibition". Ameritech Motion at 9.

ification or a waiver because, as they see it, the "decree's information services prohibition was intended to apply to services provided over the operating companies' land-line networks, not to services provided over competitive networks such as cellular radio." [94]

The basis for the companies' conclusion is not clear. Certainly, it could not rest on language in the decree, for the language contains no such exception. Similarly, that conclusion could not have been derived from any expression of intent by the Court in the 1982 Opinion which explained the decree [95] or by the Department of Justice which performed a like service in its Competitive Impact Statement. Instead, the companies simply assert that the prohibition cannot be deemed to apply to the marketing of services in a competitive environment because the monopoly-competition dichotomy, so it is claimed, forms the basic structure of the decree.[96]

That view of the decree is not only overly simplistic; it is quite wrong. The Regional Companies are not merely prohibited from providing certain types of serv-

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[94] Ameritech Motion to Provide Voice Storage at 5-6; see also, Memorandum of Southwestern Bell in Support of Ameritech's Motion to Provide Voice Storage at 3-4. Ameritech appears to contend that the Court could make the finding implied by its argument in the context of a request for clarification as distinguished from a waiver motion. Whatever may be the technical appellation of a particular motion, the movant would still have to demonstrate the existence of the condition prescribed by section VIII(C)—that there is no substantial possibility that the movant could use its monopoly power to impede competition in the market it seeks to enter, and the Court would still be required to attach such conditions as would be appropriate to achieve the results required by that section.

[95] Nor could it have been derived from any other Opinion of the Court.

[96] See, *e.g.*, Ameritech Motion to Provide Voice Storage at 6-7; Ameritech Reply Memorandum in Support of Motion to Provide Voice Storage at 3-5; NYNEX Comments in Support of Ameritech's Motion to Provide Voice Storage at 2-3.

ice depending upon whether the services are in the monopoly or the competitive category;[97] they are prohibited from providing *any* product or service other than those which they are explicitly permitted to market. Since the time the consent decree was modified at the request of the Court, and since the time the Court granted a number of waivers to the Regional Companies, the conceptual neatness advocated at one time by the Department of Justice has disappeared.[98] The Regional Companies now legitimately engage in the monopoly services represented by exchange telecommunications and exchange access pursuant to the original consent decree; in the marketing of two competitive services (CPE and Yellow Pages) in accordance with the decree as modified at the request of the Court; and in the provision of a number of other competitive products and services as permitted pursuant to waivers granted by the Court.

What does remain clear is that the Regional Companies may not provide any product or service—other than those enumerated in sections II(D)(3), VIII(A) and VIII(B)—unless they are authorized to do so by a modification of the decree or by a waiver pursuant to section VIII(C). No Regional Company is attempting in the current motions before the Court to avail itself of either of these remedies.

Moreover, it is not at all certain that the Regional Companies could make the showing required by section VIII (C) with respect to voice storage and retrieval. As the

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[97] To be sure, as discussed in Part I, *supra*, the decree rests in large part on the need to keep bottleneck monopolists out of competitive markets where their monopoly could afford them an undue advantage. However, as indicated below, it does not follow that a claim of absence of such an advantage is sufficient to override specific decree prohibitions.

[98] Compare Bell Atlantic Memorandum in Support of Pacific Telesis' Motion at 12.

Court has previously noted,[99] part of the reason for barring the Operating Companies from entry into the information services market was to allow competition to develop in that market without hindrance from monopolists. Although the cellular radio market may be competitive, each Operating Company retains a monopoly in its local exchange market, and the presence of these companies on a broad scale in a market closely related to that in which they retain such a monopoly raises some of the very concerns that led to the information and adoption of the decree.[100]

Moreover, the generation of incentives to the Regional Companies to design their local networks in such a manner as to accomodate the maximum number of information service providers was one of the stated reasons for the imposition of the information services prohibition.[101]

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[99] *United States v. AT & T, supra,* 552 F.Supp. at 188-89.

[100] For that reason, among others, the Court rejects the contention that the cellular market presents a competitive situation where "technological developments and different market structures negate the purpose and reverse the possible competitive effect of the information services prohibition." Ameritech Motion to Provide Voice Storage at 9. Only a request for modification or for waiver can provide the context for an exploration of that contention as well of other issues, such as the questions raised by Associated Telephone Answering Exchanges, Inc. Response of ATAE at 7-8.

[101] *United States v. AT & T, supra,* 552 F.Supp. at 189-90. See also, *United States v. Western Electric Co., supra,* 578 F.Supp. at 659 n. 4, where the Court stated that

> This prohibition is necessary because the Operating Companies would have both the incentive and the ability to discriminate against competing information providers either by granting more favorable access to the local network to their own information services or by subsidizing their services with revenues from the local exchange monopoly. Moreover, the prohibition against providing information services gives Operating Companies an incentive to design their local networks to accomodate the maximum number of information service providers.

On this basis, as the Department of Justice correctly points out,[102] the decree's requirement that the Operating Companies provide nondiscriminatory information access applies equally to the activities of their cellular subsidiaries.

As for Ameritech's concern that it would lose its cellular customers if it could not supply such a service,[103] it is no more persuasive than is the argument made in another motion that the Regional Companies will lose CPE market share if they are not also permitted to enter the shared tenant services business (see pp. 1103-1104, *supra*). The decree simply does not contemplate that the Regional Companies may use claims of inability to compete[104] with respect to the services they are permitted to provide as levers for prying open markets that are prohibited to them. The Regional Companies' fear of loss of cellular customers is best alleviated by their design of their cellular systems to maximize access of voice storage providers to the cellular network, rather than by attempts to circumvent the decree's purpose through a "clarification" of section II(D)(1).

Ameritech's final substantive argument[105]—that the Regional Companies should be able to provide this service

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[102] Response of the United States to Ameritech's Voice Storage Motion at 6-10.

[103] Ameritech Reply Memorandum at 17. The other Regional Companies (BellSouth, Southwestern Bell, and NYNEX) make similar arguments.

[104] These claims are, of course, not supported by any record made in the context of a waiver application, and they may well turn out to be erroneous.

[105] Ameritech makes two additional points which deserve only brief mention.

First, the company claims that its position on information services in the cellular market is supported by this Court's decision of November 1, 1983 authorizing service beyond exchange boundaries by cellular carriers. Memorandum at 8, 13. See *United States v.*

because AT & T is permitted to supply information services [106]—is frivolous. AT & T no longer provides monopoly services [107]—it is engaged in the competitive marketplace, and for that reason it is not subject to the restrictions which the decree imposes on the Operating Companies which continue to hold local telephone monopolies.[108] To seek to equate the present AT & T with the

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Western Electric Co., supra, 578 F.2d at 652-53. This argument is incorrect for the reasons cited in notes 25 and 77, *supra.*

Second, the Regional Companies argue that there is no threat of anticompetitive behavior in the cellular voice storage market because they are required by the Court and the FCC to afford competitors interconnections on the same terms and conditions they afford to their own cellular subsidiaries (Ameritech Motion to Provide Voice Storage at 10 n. *; Ameritech Reply Memorandum at 11 n. *), and because their cellular operations are operated by separate subsidiaries (Comments of BellSouth in Support of Ameritech's Voice Storage Motion at 3).

The Bell System was under an interconnection obligation with respect to the services it provided, yet there was evidence that it did not consistently abide by its responsibilities in that regard. *See United States v. AT & T, supra,* 524 F.Supp. at 1348. This lawsuit accordingly became necessary, and so did the decree in this case. The Court therefore will not rely on injunctive remedies alone. See *United States v. AT & T, supra,* 552 F.Supp. at 167-68. Likewise, the separate subsidiary requirement, while helpful, is obviously not adequately by itself to override the prohibitions in the decree and the dangers that gave rise to their formulation and adoption.

[106] Transcript of hearing of August 9, 1985 at 46; Ameritech Motion to Provide Voice Storage at 8; see also, Reply Comments of US West on the Shared Services Motion at 8.

[107] To be sure, AT & T still maintains a very high share in the interexchange market. However, with the arrival across the nation of equal access, as well as for other reasons, that market share is diminishing. In any event, AT & T is faced with significant competition in its markets; the Regional Companies remain de jure and de facto regulated monopolies.

[108] See also, *United States v. Western Electric Co., supra,* 578 F.Supp. at 659 n. 6.

Regional Companies not only flies in the face of the language of the decree but also contradicts the thousands of words which have been written since that decree was issued—by the Court, by the parties, by the Regional Companies themselves, and by numerous intervenors. Ameritech's attempt to equate the two situations thus serves only to highlight the fundamental flaws in its argument. See note 19, *supra*.

For the reasons stated, it is this 13th day of January, 1986 ORDERED that all the motions be and they are hereby denied.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 74-1698, 82-0192
Misc. No. 82-0025 (PI)

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; and
BELL TELEPHONE LABORATORIES, INC.,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., and
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Defendants.

Aug. 11, 1982

Modification of Final Judgment
Aug. 24, 1982

Judgment Affirmed Feb. 28, 1983
See 103 S.Ct. 1240

D. *Participation of the Bell Operating Companies*

Many persons and organizations have questioned the lack of independent representation for the Operating Companies in this proceeding, both prior to the entry of judgment and in conjunction with the preparation of the plan of reorganization. They contend that AT & T's interests under the proposed settlement are diametrically opposed to those of the Operating Companies, and that AT & T therefore cannot be relied upon to act in the Operating Companies' best interests. They suggest that, for these reasons, the Court should ensure the proper representation of the Operating Companies either by divesting them immediately or by appointing a guardian *ad litem* or similar officer to represent their interests. Such participation will not be ordered at this stage of the proceedings, both because it is not necessary, and, more fundamentally, because there is no practical means for effecting it.

First. It is not at all clear that AT & T will act contrary to the interests of the Operating Companies. Under the proposed decree, AT & T's shareholders will become the shareholders of the Operating Companies and, should AT & T act to undermine the interests of these Companies or fail appropriately to protect them, it and

its managers might be liable civilly for breach of their fiduciary duty to these shareholders. See Part IX *supra*. Moreover, since the divested Operating Companies will supply AT & T's sole avenue of access to telephone subscribers and will potentially be large purchasers of Western Electric equipment, AT & T has additional incentives to protect their interests.

Second. The views which the Operating Companies might be expected to espouse have substantially been presented in this proceeding. With respect to all of the issues which presumably would concern the Operating Companies—principally the distribution of the assets and the corporate debt, the restrictions on Operating Company operations, the Operating Company access requirements—able parties with able counsel have presented to the Court the factual, legal, and policy arguments bearing upon these questions. In the main, the Operating Companies would have no particular expertise that would give special value to their participation: the Court's decision generally rests upon the rationale of improved competition, and the relevant information on that subject is available to those who are now before the Court. That is not to say, certainly, that the Operating Companies, if they had independent representation, would not make a contribution; obviously they could and would. But in the opinion of the Court that contribution is not so critical as to outweigh the adverse factors recited below.

Third. There is no existing procedural mechanism which would lend itself to the expression of the views of the Operating Companies. Two alternatives have been advanced: an immediate spin-off of the Operating Companies so as to enable them to bargain with AT & T and the Justice Department concerning the terms of the proposed decree, and the appointment of a guardian or trustee to represent their interests in this and future proceedings.

An immediate spin-off of the Operating Companies, while superficially appealing, would be entirely impractical and, notwithstanding the Court's urging, none of those who has advocated such a spin-off has presented a plan that is even remotely feasible. In fact, such an action would leave entirely unresolved all of the problems of administrative coordination, interconnection, and continuity of service that are addressed in the proposed decree.

For example, as a consequence of such a spin-off, the Operating Companies would be wholly independent of AT & T, required to provide to AT & T neither services nor assistance. At a minimum, this would leave AT & T at a serious disadvantage relative to competitors who have constructed their own complete networks among major cities;[373] at worst, this course would disrupt, for months or perhaps years, the nation's telecommunications network, with incalculable consequences to trade and defense, as well as to ordinary communication and interaction among citizens. At the same time, such a spin-off would leave local and interexchange facilities integrated under the common ownership of the Operating Companies, and it would thus be directly contrary to the antitrust objectives of these lawsuits. The Court will not attempt to catalogue all of the other problems and difficulties that would inevitably accompany a separation without advance planning or agreement similar to that embodied in the proposed decree; but there can be no question but that, in a separation of this magnitude, they would be manifold and in all likelihood insurmountable.[374]

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[373] The Operating Companies own most of the facilities necessary for the provision of interexchange service. See Exhibit D-24B-1011. The functioning of AT & T's Long Lines Department would be substantially impaired if the Operating Companies were divested intact.

[374] Much of the impetus for an immediate spin-off results from the belief that there should be arm's length bargaining regarding the

As indicated, beyond expressing the general expectation that all those matters may somehow be worked out, not one person or organization has even attempted to suggest practical solutions. For all these reasons, then, the Court has concluded that it will not require an immediate spin-off.

While the Court's power to appoint a guardian, trustee, or similar officer to represent the interests of the Operating Companies is far from clear, its rejection, again, must be bottomed primarily upon the practical difficulties inherent in this approach. If a guardian were appointed at this time, even before the plan of reorganization has been formulated, he could be expected to face considerable difficulty in obtaining the type of detailed information from the Operating Companies which would be the *raison d'etre* of his participation. The personnel of the Operating Companies and the information they possess would remain under the control of AT & T and it is unlikely that a guardian could secure sufficient assistance from them at this stage to warrant the disruption his appointment would entail. Development of an independent expertise by the guardian would be likely to take years, further delaying resolution of this litigation without the promise of any real benefits to the decision-making process.

Participation by the Operating Companies, through their own chief executive officers, will be appropriate, however, with respect to the process of implementation of the decree. At the time the plan of reorganization is presented, the seven new regional Operating Companies and their chief executives will be a long way on the road toward independence, with a substantial incentive to rep-

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valuation of the assets being divided between AT & T and the Operating Companies. That argument in favor of an immediate spin-off is meritless, however, because the Court has concluded that net book value rather than market value is the appropriate standard for this division. See Part IX *supra*.

resent and advocate their own interests. Moreover, their familiarity with the facilities required to provide local and intercity service and exchange access would give them special expertise concerning the adequacy of the reorganization plan in regard to the division of assets.

The Court accordingly intends to require that, at the time the plan of reorganization is submitted to the Court by the Department of Justice, the designated chief executive officers of the seven regional Operating Companies file with the Court sworn statements certifying that, to the best of their knowledge, the plan will leave the companies which they head as viable entities with the resources necessary to perform the functions described in the decree. These statements will also be expected to discuss any element of the plan of reorganization that may have been imposed by AT & T over the objections of any chief executive officer.[375] The Court expects, additionally, to call upon the chief executive officers or their staffs to participate in other respects as well in the proceedings held at the time the plan of reorganization is presented for judicial approval.

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[375] In order to enable the Court to assess the weight to be accorded to the statements of these individuals, they will also be invited, but not required, to reveal any continuing relationship.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 74-1698, 82-0192
Misc. No. 82-0025 (PI)

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; and
BELL TELEPHONE LABORATORIES, INC.,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., and
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Defendants.

Aug. 11, 1982

Modification of Final Judgment

Aug. 24, 1982

Judgment Affirmed Feb. 28, 1983
See 103 S.Ct. 1240

MODIFICATION OF FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on January 14, 1949; the defendants having appeared and filed their answer to such complaint denying the substantive allegations thereof; the parties, by their attorneys, having severally consented to a Final Judgment which was entered by the Court on January 24, 1956, and the parties having subsequently agreed that modification of such Final Judgment is required by the technological, economic and regulatory changes which have occurred since the entry of such Final Judgment;

Upon joint motion of the parties and after hearing by the Court, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Final Judgment entered on January 24, 1956, is hereby vacated in its entirety and replaced by the following items and provisions:

I

AT & T Reorganization

A. Not later than six months after the effective date of this Modification of Final Judgment, defendant AT & T shall submit to the Department of Justice for its ap-

proval, and thereafter implement, a plan of reorganization. Such plan shall provide for the completion, within 18 months after the effective date of this Modification of Final Judgment, of the following steps:

1. The transfer from AT & T and its affiliates to the BOCs, or to a new entity subsequently to be separated from AT & T and to be owned by the BOCs, of sufficient facilities, personnel, systems, and rights to technical information to permit the BOCs to perform, independently of AT & T, exchange telecommunications and exchange access functions, including the procurement for, and engineering, marketing and management of, those functions, and sufficient to enable the BOCs to meet the equal exchange access requirements of Appendix B;

2. The separation within the BOCs of all facilities, personnel and books of account between those relating to the exchange telecommunications or exchange access functions and those relating to other functions (including the provision of interexchange switching and transmission and the provision of customer premises equipment to the public); provided that there shall be no joint ownership of facilities, but appropriate provision may be made for sharing, through leasing or otherwise, of multifunction facilities so long as the separated portion of each BOC is ensured control over the exchange telecommunications and exchange access functions;

3. The termination of the License Contracts between AT & T and the BOCs and other subsidiaries and the Standard Supply Contract between Western Electric and the BOCs and other subsidiaries; and

4. The transfer of ownership of the separated portions of the BOCs providing local exchange and exchange access services from AT & T by means of a spin-off of stock of the separated BOCs to the shareholders of AT & T, or by other disposition; provided that nothing in this Modification of Final Judgment shall require or prohibit

the consolidation of the ownership of the BOCs into any particular number of entities.

B. Notwithstanding separation of ownership, the BOCs may support and share the costs of a centralized organization for the provision of engineering, administrative and other services which can most efficiently be provided on a centralized basis. The BOCs shall provide, through a centralized organization, a single point of contact for coordination of BOCs to meet the requirements of national security and emergency preparedness.

C. Until September 1, 1987, AT & T, Western Electric, and the Bell Telephone Laboratories, shall, upon order of any BOC, provide on a priority basis all research, development, manufacturing, and other support services to enable the BOCs to fulfill the requirements of this Modification of Final Judgment. AT & T and its affiliates shall take no action that interferes with the BOCs' requirements of nondiscrimination established by section II.

D. After the reorganization specified in paragraph I(A)(4), AT & T shall not acquire the stock or assets of any BOC.

II

BOC Requirements

A. Subject to Appendix B, each BOC shall provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT& T and its affiliates.

B. No BOC shall discriminate between AT & T and its affiliates and their products and services and other persons and their products and services in the:

1. procurement of products and services;

2. establishment and dissemination of technical information and procurement and interconnection standards;

3. interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service; and

4. provision of new services and the planning for and implementation of the construction or modification of facilities, used to provide exchange access and information access.

C. Within six months after the reorganization specified in paragraph I(A)(4), each BOC shall submit to the Department of Justice procedures for ensuring compliance with the requirements of paragraph B.

D. After completion of the reorganization specified in section I, no BOC shall, directly or through any affiliated enterprise:

1. provide interexchange telecommunications services or information services;

2. manufacture or provide telecommunications products or customer premises equipment (except for provision of customer premises equipment for emergency services); or

3. provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff.

III

Applicability and Effect

The provisions of this Modification of Final Judgment, applicable to each defendant and each BOC, shall be binding upon said defendants and BOCs, their affiliates, successors and assigns, officers, agents, servants, employees,

and attorneys, and upon those persons in active concert or participation with each defendant and BOC who receive actual notice of this Modification of Final Judgment by personal service or otherwise. Each defendant and each person bound by the prior sentence shall cooperate in ensuring that the provisions of this Modification of Final Judgment are carried out. Neither this Modification of Final Judgment nor any of its terms or provisions shall constitute any evidence against, an admission by, or an estoppel against any party or BOC. The effective date of this Modification of Final Judgment shall be the date upon which it is entered.

IV

Definitions

For the purposes of this Modification of Final Judgment:

A. "Affiliate" means any organization or entity, including defendant Western Electric Company, Incorporated, and Bell Telephone Laboratories, Incorporated, that is under direct or indirect common ownership with or control by AT & T or is owned or controlled by another affiliate. For the purposes of this paragraph, the terms "ownership" and "owned" mean a direct or indirect equity interest (or the equivalent thereof) of more than fifty (50) percent of an entity. "Subsidiary" means any organization or entity in which AT & T has stock ownership, whether or not controlled by AT & T.

B. "AT & T" shall mean defendant American Telephone and Telegraph Company and its affiliates.

C. "Bell Operating Companies" and "BOCs" mean the corporations listed in Appendix A attached to this Modification of Final Judgment and any entity directly or indirectly owned or controlled by a BOC or affiliated through substantial common ownership.

D. "Carrier" means any person deemed a carrier under the Communications Act of 1934 or amendments thereto, or, with respect to intrastate telecommunications, under the laws of any State.

E. "Customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications, but does not include equipment used to multiplex, maintain, or terminate access lines.

F. "Exchange access" means the provision of exchange services for the purpose of originating or terminating interexchange telecommunications. Exchange access services include any activity or function performed by a BOC in connection with the origination or termination of interexchange telecommunications, including but not limited to, the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, directory services, testing and maintenance of facilities and the provision of information necessary to bill customers. Such services shall be provided by facilities in an exchange area for the transmission, switching, or routing, within the exchange area, of interexchange traffic originating or terminating within the exchange area, and shall include switching traffic within the exchange area above the end office and delivery and receipt of such traffic at a point or points within an exchange area designated by an interexchange carrier for the connection of its facilities with those of the BOC. Such connections, at the option of the interexchange carrier, shall deliver traffic with signal quality and characteristics equal to that provided similar traffic of AT & T, including equal probability of blocking, based on reasonable traffic estimates supplied by each interexchange carrier. Exchange services for exchange access shall not include the performance by any BOC of interexchange traffic routing for any interexchange carrier. In the reorganization specified in section I, trunks used

to transmit AT & T's traffic between end offices and class 4 switches shall be exchange access facilities to be owned by the BOCs.

G. "Exchange area," or "exchange" means a geographic area established by a BOC in accordance with the following criteria:

1. any such area shall encompass one or more contiguous local exchange areas serving common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries;

2. every point served by a BOC within a State shall be included within an exchange area;

3. no such area which includes part or all of one standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States) shall include a substantial part of any other standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States), unless the Court shall otherwise allow; and

4. except with approval of the Court, no exchange area located in one State shall include any point located within another State.

H. "Information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or other symbols.

I. "Information access" means the provision of specialized exchange telecommunications services by a BOC in an exchange area in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services. Such specialized exchange telecommunications services include, where necessary, the provision of network control signalling, answer supervision, automatic calling number identifica-

tion, carrier access codes, testing and maintenance of facilities, and the provision of information necessary to bill customers.

J. "Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

K. "Interexchange telecommunications" means telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area.

L. "Technical information" means intellectual property of all types, including, without limitation, patents, copyrights, and trade secrets, relating to planning documents, designs, specifications, standards, and practices and procedures, including employee training.

N. "Telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services.

O. "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, by means of electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.

P. "Telecommunications service" means the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities.

Q. "Transmission facilities" means equipment (including without limitation wire, cable, microwave, satellite, and fiberoptics) that transmit information by electromagnetic means or which directly support such transmission, but does not include customer premises equipment.

V

Compliance Provisions

The defendants, each BOC, and affiliated entities are ordered and directed to advise their officers and other management personnel with significant responsibility for matters addressed in this Modification of Final Judgment of their obligations hereunder. Each BOC shall undertake the following with respect to each such officer or management employee:

1. The distribution to them of a written directive setting forth their employer's policy regarding compliance with the Sherman Act and with this Modification of Final Judgment, with such directive to include:

(a) an admonition that non-compliance with such policy and this Modification of Final Judgment will result in appropriate disciplinary action determined by their employer and which may include dismissal; and

(b) advise that the BOC's legal advisors are available at all reasonable times to confer with such persons regarding any compliance questions or problems;

2. The imposition of a requirement that each of them sign and submit to their employer a certificate in substantially the following form:

The undersigned hereby (1) acknowledges receipt of a copy of the 1982 *United States v. Western Electric* Modification of Final Judg-

ment and a written directive setting forth Company policy regarding compliance with the antitrust laws and with such Modification of Final Judgment, (2) represents that the undersigned has read such Modification of Final Judgment and directive and understands those provisions for which the undersigned has responsibility, (3) acknowledges that the undersigned has been advised and understands that non-compliance with such policy and Modification of Final Judgment will result in appropriate disciplinary measures determined by the Company and which may include dismissal, and (4) acknowledges that the undersigned has been advised and understands that non-compliance with the Modification of Final Judgment may also result in conviction for contempt of court and imprisonment and/or fine.

VI

Visitorial Provisions

A. For the purpose of determining or securing compliance with this Modification of Final Judgment, and subject to any legally recognized privilege, from time to time:

1. Upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to a defendant or after the reorganization specified in section I, a BOC, made to its principal office, duly authorized representatives of the Department of Justice shall be permitted access during office hours of such defendants or BOCs to depose or interview officers, employees, or agents, and inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, BOC,

or subsidiary companies, who may have counsel present, relating to any matters contained in this Modification of Final Judgment; and

2. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to a defendant's principal office or, after the reorganization specified in section I, a BOC, such defendant, or BOC, shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Modification of Final Judgment as may be requested.

B. No information or documents obtained by the means provided in this section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States or the Federal Communications Commission, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

C. If at the time information or documents are furnished by a defendant to plaintiff, such defendant or BOC represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, then 10 days' notice shall be given by plaintiff to such defendant or BOC prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which that defendant or BOC is not a party.

VII

Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in

section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

VIII

Modifications

A. Notwithstanding the provisions of section II(D)(2), the separated BOCs shall be permitted to provide, but not manufacture, customer premises equipment.

B. Notwithstanding the provisions of section II(D)(3), the separated BOCs shall be permitted to produce, publish, and distribute printed directories which contain advertisements and which list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses.

Notwithstanding the provisions of sections I(A)(1), I(A)(2), I(A)(4), all facilities, personnel, systems, and rights to technical information owned by AT & T, its affiliates, or the BOCs which are necessary for the production, publication, and distribution of printed advertising directories shall be transferred to the separated BOCs.

C. The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

D. AT & T shall not engage in electronic publishing over its own transmission facilities. "Electronic publishing" means the provision of any information which AT & T or its affiliates has, or has caused to be, originated,

authored, compiled, collected, or edited, or in which it has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means.

Nothing in this provision precludes AT & T from offering electronic directory services that list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses; or from providing the time, weather, and such other audio services as are being offered as of the date of the entry of the decree to the geographic areas of the country receiving those services as of that date.

Upon application of AT & T, this restriction shall be removed after seven years from the date of entry of the decree, unless the Court finds that competitive conditions clearly require its extension.

E. If a separated BOC provides billing services to AT & T pursuant to Appendix B(C)(2), it shall include upon the portion of the bill devoted to interexchange services the following legend:

> This portion of your bill is provided as a service to AT & T. There is no connection between this company and AT & T. You may choose another company for your long distance telephone calls while still receiving your local telephone service from this company.

F. Notwithstanding the provisions of Appendix B(C)(3), whenever, as permitted by the decree, a separated BOC fails to offer exchange access to an interexchange carrier that is equal in type and quality to that provided for the interexchange traffic of AT & T, the tariffs filed for such less-than-equal access shall reflect the lesser cost, if any, of such access as compared to the exchange access provided AT & T.

G. Facilities and other assets which serve both AT & T and one or more BOCs shall be transferred to the separated BOCs if the use made by such BOC or BOCs predominates over that of AT & T. Upon application by a party or a BOC, the Court may grant an exception to this requirement.

H. At the time of the transfer of ownership provided for in section I(A)(4), the separated BOCs shall have debt ratios of approximately forty-five percent (except for Pacific Telephone and Telegraph Company which shall have a debt ratio of approximately fifty percent), and the quality of the debt shall be representative of the average terms and conditions of the consolidated debt held by AT & T, its affiliates and the BOCs at that time. Upon application by a party or a BOC, the Court may grant an exception to this requirement.

I. The Court may act *sua sponte* to issue orders or directions for the construction or carrying out of this decree, for the enforcement of compliance therewith, and for the punishment of any violation thereof.

J. Notwithstanding the provisions of section I(A), the plan of reorganization shall not be implemented until approved by the Court as being consistent with the provisions and principles of the decree.

APPENDIX A

Bell Telephone Company of Nevada

Illinois Bell Telephone Company

Indiana Bell Telephone Company, Incorporated

Michigan Bell Telephone Company

New England Telephone and Telegraph Company

New Jersey Bell Telephone Company

New York Telephone Company

Northwestern Bell Telephone Company

Pacific Northwest Bell Telephone Company

South Central Bell Telephone Company

Southern Bell Telephone and Telegraph Company

Southwestern Bell Telephone Company

The Bell Telephone Company of Pennsylvania

The Chesapeake and Potomac Telephone Company

The Chesapeake and Potomac Telephone Company of Maryland

The Chesapeake and Potomac Telephone Company of Virginia

The Chesapeake and Potomac Telephone Company of West Virginia

The Diamond State Telephone Company

The Mountain States Telephone and Telegraph Company

The Ohio Bell Telephone Company

The Pacific Telephone and Telegraph Company

Wisconsin Telephone Company

APPENDIX B

PHASED-IN BOC PROVISION OF EQUAL EXCHANGE ACCESS

A. 1. As part of its obligation to provide nondiscriminatory access to interexchange carriers, no later than September 1, 1984, each BOC shall begin to offer to all interexchange carriers exchange access on an unbundled, tariffed basis, that is equal in type and quality to that provided for the interexchange telecommunications services of AT & T and its affiliates. No later than September 1, 1985, such equal access shall be offered through end offices of each BOC serving at least one-third of that BOC's exchange access lines and, upon bona fide request, every end office shall offer such access by September 1, 1986. Nothing in this Modification of Final Judgment shall be construed to permit a BOC to refuse to provide to any interexchange carrier or information service provider, upon bona fide request, exchange or information access superior or inferior in type or quality to that provided for AT & T's interexchange services or information services at charges reflecting the reduced or increased cost of such access.

2. (i) Notwithstanding paragraph (1), in those instances in which a BOC is providing exchange access for Message Telecommunications Service on the effective date of this Modification of Final Judgment through access codes that do not permit the designation of more than one interexchange carrier, then, in accordance with the schedule set out in paragraph (1), exchange access for additional carriers shall be provided through access codes containing the minimum number of digits necessary at the time access is sought to permit nationwide, multiple carrier designation for the number of interexchange carriers reasonably expected to require such designation in the immediate future.

(ii) Each BOC shall, in accordance with the schedule set out in paragraph (1), offer as a tariffed service ex-

change access that permits each subscriber automatically to route, without the use of access codes, all the subscriber's interexchange communications to the interexchange carrier of the customer's designation.

(iii) At such time as the national numbering area (area code) plan is revised to require the use of additional digits, each BOC shall provide exchange access to every interexchange carrier, including AT & T, through a uniform number of digits.

3. Notwithstanding paragraphs (1) and (2), with respect to access provided through an end office employing switches technologically antecedent to electronic, stored program control switches or those offices served by switches that characteristically serve fewer than 10,000 access lines, a BOC may not be required to provide equal access through a switch if, upon complaint being made to the Court, the BOC carries the burden of showing that for particular categories of services such access is not physically feasible except at costs that clearly outweigh potential benefits to users of telecommunications services. Any such denial of access under the preceding sentence shall be for the minimum divergence in access necessary, and for the minimum time necessary, to achieve such feasibility.

B. 1. The BOCs are ordered and directed to file, to become effective on the effective date of the reorganization described in paragraph I(A)(4), tariffs for the provision of exchange access including the provision by each BOC of exchange access for AT & T's interexchange telecommunications. Such tariffs shall provide unbundled schedules of charges for exchange access and shall not discriminate against any carrier or other customer. Such tariffs shall replace the division of revenues process used to allocate revenues to a BOC for exchange access provided for the interexchange telecommunications of BOCs or AT & T.

2. Each tariff for exchange access shall be filed on an unbundled basis specifying each type of service, element by element, and no tariff shall require an interexchange carrier to pay for types of exchange access that it does not utilize. The charges for each type of exchange access shall be cost justified and any differences in charges to carriers shall be cost justified on the basis of differences in services provided.

3. Notwithstanding the requirements of paragraph (2), from the date of reorganization specified in section I until September 1, 1991, the charges for delivery or receipt of traffic of the same type between end offices and facilities of interexchange carriers within an exchange area, or within reasonable subzones of an exchange area, shall be equal, per unit of traffic delivered or received, for all interexchange carriers; provided, that the facilities of any interexchange carrier within five miles of an AT & T class 4 switch shall, with respect to end offices served by such class 4 switch, be considered to be in the same subzone as such class 4 switch.

4. Each BOC offering exchange access as part of a joint or through service shall offer to make exchange access available to all interexchange carriers on the same terms and conditions, and at the same charges, as are provided as part of a joint or through service, and no payment or consideration of any kind shall be retained by the BOC for the provision of exchange access under such joint or through service other than through tariffs filed pursuant to this paragraph.

C. 1. Nothing in this Modification of Final Judgment shall be construed to require a BOC to allow joint ownership or use of its switches, or to require a BOC to allow co-location in its building of the equipment of other carriers. When a BOC uses facilities that (i) are employed to provide exchange telecommunications or exchange access or both, and (ii) are also used for the transmission

or switching of interexchange telecommunications, then the costs of such latter use shall be allocated to the interexchange use and shall be excluded from the costs underlying the determination of charges for either of the former uses.

2. Nothing in this Modification of Final Judgment shall either require a BOC to bill customers for the interexchange services of any interexchange carrier or preclude a BOC from billing its customers for the interexchange services of any interexchange carrier it designates, provided that when a BOC does provide billing services to an interexchange carrier, the BOC may not discontinue local exchange service to any customer because of nonpayment of interexchange charges unless it offers to provide billing services to all interexchange carriers, and provided further that the BOC's cost of any such billing shall be included in its tariffed access charges to that interexchange carrier.

3. Whenever, as permitted by this Modification of Final Judgment, a BOC fails to offer exchange access to an interexchange carrier that is equal in type and quality to that provided for the interexchange traffic of AT & T, nothing in this Modification of Final Judgment shall prohibit the BOC from collecting reduced charges for such less-than-equal exchange access to reflect the lesser value of such exchange access to the interexchange carrier and its customers compared to the exchange access provided AT & T.

APPENDIX E

CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, in any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub. L. 93-528, § 3, 88 Stat. 1708.)

§ 16. Judgments

(a) Prima facie evidence; collateral estoppel

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by

or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 45 of this title which could rise to a claim for relief under the antitrust laws.

(b) Consent judgments and competitive impact statements; publication in Federal Register; availability of copies to the public

Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless

otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief, to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

(c) Publication of summaries in newspapers

The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

(i) a summary of the terms of the proposal for the consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b) of this section,

(iii) and a list of the materials and documents under subsection (b) of this section which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) Consideration of public comments by Attorney General and publication of response

During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b) of this section. The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

(e) Public interest determination

Before entering any consent judgment proposed by the United States under this section the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) Procedure for public interest determination

In making its determination under subsection (e) of this section, the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

(g) Filing of written or oral communications with the district court

Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Inadmissibility as evidence of proceedings before the district court and the competitive impact statement

Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 15a of this title nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

(3)

Supreme Court, U.S.
FILED
FEB 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-776

In the Supreme Court of the United States

OCTOBER TERM, 1986

U S WEST, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the consent decree that resulted in the divestiture by the American Telephone and Telegraph Company of its wholly owned local operating subsidiaries is lawfully binding on those subsidiaries.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-19a) is reported at 797 F.2d 1082. The opinion of the district court (Pet. App. 20a-64a) is reported at 627 F. Supp. 1090. Opinions of the district court at earlier stages of the litigation are reported at 569 F. Supp. 1057 (1983) and 552 F. Supp. 131 (1982).

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1986, and the petition for a writ of certiorari was filed on November 13, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge to the 1982 antitrust consent decree that required American Telephone & Telegraph Company (AT&T) to divest to its shareholders its 22 wholly

owned Bell operating companies (BOCs), which provide the majority of the nation with local telephone service. Petitioner, U S West, Inc., is one of seven regional holding companies (RHCs) that were created under the consent decree to own and operate the BOCs after the divestiture. Among its many provisions, the consent decree generally prohibits the RHCs and BOCs from engaging in any business other than local telephone services without prior court approval. U S West now claims that the restrictions imposed by the consent decree, and accepted by its former parent corporation (AT&T), violate due process in that AT&T did not adequately represent its subsidiaries during the consent decree proceedings.

A. *Procedural History*

1. On January 14, 1949, the United States filed an antitrust action against AT&T and its subsidiary, Western Electric Company, Inc., alleging that the defendants had monopolized and conspired to restrain trade in the manufacture, distribution, sale and installation of telephones and telephone equipment, in violation of Sections 1, 2, and 3 of the Sherman Act, 15 U.S.C. 1, 2, and 3. In 1956, following periodic negotiations, the government and AT&T settled the lawsuit by entering into a consent decree. That decree generally prohibited AT&T from engaging in any business other than the furnishing of common carrier communications services, except that its Western Electric subsidiary was permitted to manufacture types of equipment used by the Bell System. 552 F. Supp. 131, 135-138 (1982).

2. On November 20, 1974, the United States filed a new antitrust action against AT&T, its Western Electric subsidiary, and a second AT&T subsidiary, Bell Telephone Laboratories. The complaint charged the defendants with monopolization, conspiracy to monopolize, and attempt to monopolize a broad range of telecommunications services

and equipment, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. The government claimed that AT&T, through its ownership of the 22 BOCs, controlled local telephone exchanges and used that control, in violation of the antitrust laws, first, to discriminate against its competitors and, second, to cross-subsidize its operations in competitive intercity (long distance) and telephone equipment markets.The complaint sought divestiture of the 22 BOCs as well as the divestiture and dissolution of Western Electric. 552 F. Supp. at 139, 160-161.

The case went to trial in 1981. At the close of the government's case in chief the defendants moved to dismiss the complaint, asserting that the government had failed to demonstrate a right to relief. The district court denied the motion.[1] On January 8, 1982, the government and AT&T announced that they had negotiated a proposed consent decree, which they presented to the district court for approval.[2] 552 F.Supp. at 140.

In broad outline, the proposed decree "split the Bell System into two basic parts—the competitive portion of the business, which would provide long distance service, manufacture telecommunications equipment, and conduct research, and the noncompetitive portion of the business, which would continue to have * * * control of local telecommunications service. The competitive portion was to be retained by AT&T and its Western Electric and Bell Labs subsidiaries, while the noncompetitive portion was assigned to the RHCs and their BOC subsidiaries." Pet. App. 3a-4a. The decree provided for divestiture of the 22 BOCs either to the AT&T shareholders directly or to the RHCs, which

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[1]See *United States* v. *AT&T*, 524 F. Supp. 1336 (D.D.C. 1981).

[2]The decree is styled as a Modification of Final Judgment because, technically, it modifies the 1956 final judgment entered in the 1949 case. Pet. App. 72a; 552 F.Supp. at 140-141.

would be owned by the AT&T shareholders. Pet. App. 2a, 73a; 552 F. Supp. at 227.[3] The proposed decree also contained "line of business restrictions" which would generally prohibit the BOCs from engaging in any business except regulated exchange telecommunications and exchange access services.[4] As the government summarized the proposed decree at the time,

> Put in simplest terms, the functional divestiture contemplated by the proposed modification will remove from AT&T the power to employ local exchange services in ways that impede competition in interdependent markets, and will remove from the BOCs, which will retain such power, any incentive to exercise it.[5]

The district court thereafter conducted an extensive proceeding to determine whether the proposed decree was in the public interest. In August 1982, the court approved the proposed consent decree with certain modifications. 552 F. Supp. 131.[6] The court found (*id.* at 165) that "the ability of AT&T to engage in anticompetitive conduct stem[med] largely from its control of the [BOCs]" and it therefore

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[3]The decree also prohibited AT&T from reacquiring the BOCs. 552 F. Supp. at 142 n.44.

[4]The proposed decree contained a general clause prohibiting the BOCs from providing "any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff." In addition, the proposed decree prohibited the RHCs and BOCs from (1) providing interexchange (long distance) service; (2) providing information services; (3) manufacturing telecommunications products or customer premises equipment; (4) marketing such equipment; or (5) providing directory advertising such as the Yellow Pages. 552 F. Supp. at 186, 227-228.

[5]Department of Justice Competitive Impact Statement In Connection with Proposed Modification of Final Judgment, 47 Fed. Reg. 7170, 7178 (1982).

[6]The consent decree, as approved by the court, is appended to the district court's opinion. 552 F. Supp. at 226-234 (Pet. App. 71a-90a).

approved the central feature of the decree: divestiture of the BOCs from AT&T. *Id.* at 160-170. The court also determined (*id.* at 186-195) that it was in the public interest to restrict the BOCs from conducting business after the divestiture in three specific markets: the provision of long distance services (*id.* at 188-189); the provision of information services (*id.* at 189-190); and the manufacture of telephone equipment (*id.* at 190-191).[7]

During the course of the proceedings to review the proposed decree, a number of persons and organizations claimed that the BOCs lacked adequate representation. These parties contended (552 F.Supp. at 220) that "AT&T's interests under the proposed settlement are diametrically opposed to those of the [BOCs], and that AT&T therefore cannot be relied upon to act in the [BOCs'] best interests." Advocates of this view proposed (*ibid.*) either divesting the

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[7]On the other hand, the court ordered removed from the proposed decree certain other restrictions on the future business of the BOCs because the court found that those restrictions did not further the public interest. *Id.* at 191-194. Moreover, the court recognized (*id.* at 194) that, in time, the BOCs might "lose the ability to leverage their monopoly power into the competitive markets from which they must now be barred." It therefore required the parties to incorporate into the decree a mechanism for removal of the line-of-business restrictions "upon a showing that there is no substantial possibility that [a BOC] could use its monopoly power to impede competition in the relevant market" (*id.* at 195). To date, under this provision the court has granted over 100 requests for waivers of the line-of-business restrictions. See, *e.g., United States* v. *Western Electric Co.*, 592 F. Supp. 846, 850-851 (D.D.C. 1984), appeal dismissed, 777 F.2d 23 (D.C. Cir. 1985). The court also noted (552 F. Supp. at 195) that the Department of Justice had undertaken to report to the court every three years concerning the continuing need for the line-of-business restrictions. On February 2, 1987, the Department of Justice filed its first such report, recommending that certain of the restrictions be removed and that others be retained in modified form. See *Report and Recommendations of the United States Concerning the Line of Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment*, Civ. No. 82-0192, at 1-8.

BOCs immediately and allowing them to participate directly in the restructuring process, or else appointing a guardian *ad litem* to represent their interests. The district court rejected these proposals. *Id.* at 220-222. It noted first (*id.* at 220) that it was "not at all clear that AT&T will act contrary to the interests of the [BOCs]." The court observed (*ibid.*) that AT&T's shareholders were to become the shareholders of the BOCs and therefore AT&T had a fiduciary duty to respect the needs of the BOCs as much as any other part of the corporation. In addition, the court found (*id.* at 221) that "[t]he views which the [BOCs] might be expected to espouse have substantially been presented in this proceeding. With respect to all of the issues which presumably would concern the [BOCs] * * * able parties with able counsel have presented to the Court the factual, legal, and policy arguments bearing upon these questions." The court also found impractical (*id.* at 221-222) the proposals intended to ensure the BOCs adecuate representation. The court agreed (*id.* at 222), however, that the BOCs could "participat[e] * * * [in] the process of implementation of the decree * * * [to ensure that] the plan will leave the companies * * * as viable entities with the resources necessary to perform the functions described in the decree."

This Court summarily affirmed the district court's order approving the proposed consent decree as modified. *Maryland* v. *United States*, 460 U.S. 1001 (1983). Thereafter, AT&T, with Department of Justice concurrence, submitted to the district court a plan for reorganization. After extensive public proceedings, which included testimony from the designated chief executives of several of the RHCs, the court approved the plan with minor changes. 569 F. Supp. 1057 (1983). This Court again summarily affirmed. *California* v. *United States*, 464 U.S. 1013 (1983).

B. *The Present Litigation*

1. The divestiture took effect on January 1, 1984: the RHCs became the owners of the BOCs and the stock of the RHCs was distributed to AT&T's shareholders (Pet. App. 4a). In 1985 a group of RHCs sought a ruling that the decree permitted them to provide exchange telecommunications and access services outside their own exchange areas without prior court approval. Apparently as an afterthought (see Pet. App. 8a n.4), petitioner, alone among the RHCs, suggested in its papers that the decree might not be binding on the RHCs. On January 13, 1986, the district court rejected that argument and otherwise denied the line-of-business requests made by the RHCs. (Pet. App. 20a-64a). The court held that "the [RHCs] are bound by the decree * * * as subsidiaries of AT&T prior to divestiture" (Pet. App. 20a-22a n.2).

2. The court of appeals unanimously affirmed in part and reversed in part (Pet. App. 1a-19a).[8] The court rejected (*id.* at 8a-11a) petitioner's claim that the application of the consent decree to the RHCs and BOCs violated due process. The court observed (*id.* at 8a-9a) that the "due process argument fails because it ignores the facts that AT&T was a party to the antitrust proceeding and both the RHCs and the BOCs were wholly owned subsidiaries of AT&T at the time the consent decree was entered." The court rejected petitioner's "remarkable proposition that a parent may not bind its wholly owned subsidiaries without affording them independent legal representation" (*id.* at 9a). The court also found "specious and irrelevant" the claim that AT&T breached a fiduciary duty owed to the BOCs and RHCs by agreeing to the line-of-business restrictions (*ibid.*). The

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[8]The court reversed certain portions of the district court's line-of-business rulings (Pet. App. 11a-18a). It also declined to reach one aspect of the line-of-business decision, concluding that petitioner lacked standing to raise that issue (*id.* at 18a-19a). The petition does not present any challenge to the court of appeals' line-of-business rulings (Pet. 12-13).

court observed (*ibid.*) that "the only duty owed by AT&T was to its shareholders, who were identical to the initial RHC shareholders."

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is not warranted.

The court of appeals concluded that, as a parent corporation, AT&T had the legal authority to bind the RHCs and BOCs in a consent decree. That decision is plainly correct. As a general proposition, this Court has repeatedly made clear that judgments may be binding on persons who are not formally parties to the underlying litigation. See, *e.g., Chicago, R.I. & P. Ry.* v. *Schendel*, 270 U.S. 611 (1926); *Heckman* v. *United States*, 224 U.S. 413 (1912). See also *Southwest Airlines Co.* v. *Texas Int'l Airlines, Inc.*, 546 F.2d 84, 94-95 (5th Cir.), cert. denied, 434 U.S. 832 (1977). For example, judgments may bind those who are privies of a party to the lawsuit. 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.411[1], at 386-387 (2d ed. 1983). And among the relationships commonly recognized as " 'sufficiently close' to justify preclusion" (*Southwest Airlines*, 546 F.2d at 95) is the relationship of a parent corporation to its wholly owned subsidiary. See, *e.g., Pan American Match Inc.* v. *Sears, Roebuck & Co.*, 454 F.2d 871, 874 (1st Cir.), cert. denied, 409 U.S. 892 (1972); *Astron Indus. Assoc., Inc.* v. *Chrysler Motors Corp.*, 405 F.2d 958, 961 (5th Cir. 1968). See also *Southmark Properties* v. *Charles House Corp.*, 742 F.2d 862, 870 (5th Cir. 1984); *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983).[9]

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[9]This Court has observed that "[a] parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or

In the present case, AT&T was the sole stockholder of the BOC subsidiaries when the consent decree was entered, and the decree expressly contemplated that after divestiture the same shareholders who owned AT&T would own the divested BOCs (Pet. App. 8a-9a). That "intimate corporate affiliation" (*id.* at 9a) allowed AT&T to act on behalf of, and to bind, its wholly owned subsidiaries.

Petitioner nevertheless contends (Pet. 17-21) that AT&T did not adequately represent its interests during the proceedings to consider the consent decree, in that the parent company "imposed line of business restrictions injurious to the BOCs in a manner which served AT&T's own post-divestiture interests" (*id.* at 17). The district court, affirmed by the court of appeals (Pet. App. 8a-9a), considered this claim in detail and rejected it. 552 F. Supp. at 220-222. The district court noted (*id.* at 220-221) that AT&T owed a fiduciary duty to the post-divestment shareholders of the subsidiaries because prior to the divestiture these owners had been AT&T's shareholders. This duty, the court concluded, together with related factors, ensured adequate representation for the subsidiaries. Moreover, the court observed that the interests of the subsidiaries were fully represented by other participants in the consent decree proceedings (*id.* at 221). The court's findings were not clearly erroneous and warrant no further review by this Court. See *Astron Indus. Assoc., Inc.*, 405 F.2d at 961; *Towle* v. *Boeing Airplane Co.*, 364 F.2d 590, 593 (8th Cir. 1966).

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determined not by two separate corporate consciousnesses, but one. * * * They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771-772 (1984) (footnote omitted).

Petitioner's reliance (Pet. 24-25) on *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), is misplaced. In *Cascade*, the Court held that certain parties had been denied the right to intervene in divestiture proceedings, and thus that a consent decree negotiated in the absence of those parties could not be enforced. Because the decree had to be remanded for new hearings, the Court went on to note particular ways in which the decree, as negotiated, fell short of what the Court had intended when it ordered the divestiture in an earlier opinion. The Court in *Cascade* did not, as petitioner contends (Pet. 24-25), remand that case because the new company created from the divestiture lacked adequate representation during the divestiture proceedings; it remanded because certain other parties had been denied participation in the proceedings and because, as a result, the decree contained terms that were inconsistent with the Court's previous mandate.[10]

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[10]Petitioner's assertion (Pet. 25-27) that there is an intracircuit conflict between the decision of the court of appeals in this case and its decision in *FTC* v. *Exxon Corp.*, 636 F.2d 1336 (1980), is mistaken. In the *Exxon* case a district court had directed Exxon to "hold separate" a recently acquired competitor while the FTC reviewed the legality of the acquisition. In order to facilitate that basic order, the district court barred lawyers for Exxon from simultaneously representing the competitor that was being held separate. The court of appeals upheld this order, agreeing that the competitor and Exxon had conflicting interests. The court noted, in particular, that "[t]he possible future owner of the [competitor] does not now exist to protect certain interests that are very much involved in the current proceedings" (636 F.2d at 1346). In the present case, by contrast, the future owners of the BOCs and RHCs were specified in the consent decree; moreover, they were simply AT & T's shareholders prior to the divestiture. Unlike Exxon, AT & T had the same fiduciary duty to the future owners of the post-divestiture competitor (here, the BOCs and RHCs) that it had to the rest of the corporation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1987

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No. 86-776

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

U S WEST, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA
and
AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,

Respondents.

OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION RESTATED

In 1983, this Court summarily affirmed the Decree that granted the United States the precise relief that it had sought in over 30 years of antitrust litigation by splitting the formerly-integrated Bell System between its monopoly and competitive businesses and imposing corresponding line of business restrictions that prohibit the newly-created firms from recreating the combinations that the Decree ended. *Maryland* v. *United States*, 460 U.S. 1001 (1983).

The question presented in this case is whether one of these successors-in-interest to the Bell System's assets can now collaterally attack the Decree on the ground that that firm's interests allegedly were not adequately represented in the earlier antitrust proceedings.

STATEMENT REQUIRED BY RULE 28.1

American Telephone and Telegraph Company ("AT&T") has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in the Cuban American Telephone and Telegraph Company, Inc.; Ing. C. Olivetti and C., S.P.A.; Cincinnati Bell Inc.; Edelson Technology Partners, L.P.; AT&T/Ricoh, Ltd.; AT&T Taiwan Telecommunications Co.; Gold Star Fiber Optics Co., Ltd.; Western Electric Saudi Arabia, Ltd.; Gold Star Semiconductor, Ltd.; Communications Software Development, Inc.; AT&T and Philips Telecommunications, B.V.; ShareTech, Inc.; Covidea; Counterpoint Computers, Inc.; Omnicad Technology Corporation; Intermetrics, Inc.; and AT&T Microelectronica de Espana, S.A.

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OCTOBER TERM, 1986

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v.

UNITED STATES OF AMERICA
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TELEGRAPH COMPANY,

Respondents.

OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

U S West is one of the seven regional companies created by the 1982 Antitrust Decree that split the Bell System between its monopoly and competitive businesses. In this appeal, U S West seeks collaterally to attack this Decree by contending that U S West's "interests" were not adequately represented in the prior antitrust proceedings and that the District Court had no jurisdiction to bind U S West and the other successors-in-interest to the Bell System's assets. The Court of Appeals found no basis for this claim, holding that the District Court had jurisdiction over all the Bell System's assets and that AT&T had vigorously represented the interests of the Bell System's over three million owners in these antitrust proceedings. App. 9a.

There is no basis for Supreme Court review of this holding. The Court of Appeals decision would be a correct application of uniformly accepted legal principles, even if U S West's version of the facts were correct. Moreover, it is only by misstating the factual and antitrust grounds for the Decree that U S West can even

advance its contention that AT&T "negotiated the [Decrees] injunctive provisions in a manner which advanced its own [post-divestiture] corporate interests at the expense of those" of the divested regional companies. Petition, p. 17.

1. Prior to January 1, 1984, AT&T, its twenty-two Bell Operating Companies ("BOCs"), Western Electric Company, and Bell Telephone Laboratories comprised a single unitary enterprise: the Bell System. The BOCs had franchised monopolies that provided local exchange telephone services to the telephone subscribers and that originated and terminated long distance ("interexchange") calls. The BOCs owned "most" of the intercity facilities required to complete interexchange calls (App. 68a n.373) as well as the equipment that is connected to the telephone network on customers' premises ("customer premises equipment"). Western Electric manufactured equipment for use by Bell System companies in providing local and interexchange services. Bell Telephone Laboratories conducted research and development. AT&T was the parent company of the Bell System and, further, itself directly owned those network facilities used exclusively to provide interstate long distance services.

The Bell System was owned by its over three million shareholders. AT&T had fiduciary obligations to these shareholders.

The Justice Department brought separate actions to break up the Bell System in 1949 and again in 1974. In each action, the United States claimed that it was inherently anticompetitive for the Bell System both to own monopoly telephone businesses and to participate in actually and potentially competitive businesses that were dependent on these telephone monopolies. In each suit, the Department thus sought to split the Bell System between its monopoly and competitive businesses.

2. This action was brought in 1949. At that time, there was competition in only one major aspect of the Bell System's opera-

tions: equipment manufacturing. The Government's Complaint thus prayed only that AT&T be ordered to divest Western Electric and to separate telephone service and manufacturing. In 1956, the parties stipulated to the entry of a judgment ("1956 Judgment") that did not require the divestiture of any part of the Bell System. However, in exchange for preserving the integration of the Bell System, the 1956 Judgment limited the Bell System to providing regulated communications services and to manufacturing equipment of the kind used for such services.

3. Over the period 1956 to 1982, the BOCs' local telephone exchange facilities retained their characteristics as both natural monopolies and franchised monopolies. However, technological and regulatory changes introduced intense actual and potential competition into other aspects of telecommunications that required access to the local Bell exchange monopolies.

Foremost, the provision of interexchange telecommunications services and customer premises equipment became intensively competitive. At the same time, technological changes substantially eliminated the earlier distinctions between regulated telecommunications services and data processing and gave rise to a new class of "information services." Participants in all these markets required access to the BOCs' local exchange monopolies to originate and terminate calls and to transmit data and information to and from their facilities. These developments further intensified the dependence of manufacturers on the BOCs and on access to technical information about their networks.

The Bell System's exchange monopolies had thus become "bottlenecks" for a wide variety of competitive businesses. The Bell System's dual role as participant in these competitive businesses and owner of monopoly facilities on which they depended meant its BOCs increasingly had, as Judge Harold H. Greene found, "both the ability and the incentive" to thwart competition by "leveraging" their local exchange monopolies to obtain im-

proper competitive advantages in two principal ways. BOCs are "able (1) to subsidize their prices in competitive markets with supra-competitive profits earned in the monopoly market, and (2) to hinder competitors by restricting their access to the intraexchange network." *United States* v. *AT&T*, 552 F. Supp. 131, 187 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

4. The potential for such abuses led to ever-increasing controversy, turmoil, and debate. In 1974, the United States filed a second suit that sought to break up the Bell System. *United States* v. *AT&T*, No. 74-1698 (D.D.C.). There, the Government claimed that the Bell System had in fact misused its local exchange bottlenecks to impair competition in long distance, equipment manufacturing, and other markets. The Department's formal relief proposal sought to prevent any future possibility of abuses in the most direct way possible: by requiring AT&T to divest the local exchange monopolies and, in turn, prohibiting the divested companies from reentering *any* competitive businesses (so long as the local telephone franchises retained their natural monopoly characteristics). *See* Stipulation Package No. 82 (Nos. 17 & 30), *United States* v. *AT&T*, No. 74-1698 (D.D.C.).

In addition, more than 70 private treble damages antitrust actions had been brought against the Bell System on this same "leveraging" theory.[1] Furthermore, the uncertainty, debate, and turmoil were not limited to antitrust courts. The identical issues were being debated before the FCC and Congress, and both were

[1] *See, e.g., Southern Pacific Communications Co.* v. *AT&T*, 740 F.2d 980 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985); *MCI Telecommunications Corp.* v. *AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Litton Systems, Inc.* v. *AT&T*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Jack Faucett Associates, Inc.* v. *AT&T*, 744 F.2d 118 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985); *TV Signal Co. of Aberdeen* v. *AT&T*, 617 F.2d 1302 (8th Cir. 1980); *International Tel. & Tel. Corp.* v. *AT&T*, 444 F. Supp. 1148 (S.D.N.Y. 1978).

actively considering proposals to develop new forms of regulation to check the ability of the Bell entities to misuse their bottlenecks.[2]

In all these forums, AT&T had vigorously denied the allegations that it abused its local exchange monopolies to obtain competitive benefits and urged that the integrated Bell System was far more efficient than any alternative. Nevertheless, it became increasingly apparent that the Bell System's integration of competitive and natural monopoly businesses would continue to divert major and ever-increasing resources of the Bell System and the entire telecommunications industry, no matter how the then-pending antitrust, regulatory, and legislative controversies were resolved. The problem was structural; the engineering advantages of integration had become outweighed by its political, regulatory, and litigation costs.

AT&T thus concluded that its obligations as a fiduciary for the Bell System's three million shareholders required it to end the crippling uncertainty and debate. It thus agreed to the exact relief proposed by the United States in the 1974 case. On January 8, 1982, the United States and AT&T stipulated to a proposed modification to the 1956 Judgment that required the divestiture of its local exchange monopolies (which would free the Bell System's competitive interexchange and manufacturing businesses from antitrust disputes over alleged abuses of bottleneck facilities) and that prohibited the divested companies from entering

[2] *See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980), *aff'd sub nom. Computer & Communications Industry Association* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); FCC CC Docket No. 78-72 (exchange access); FCC CC Docket No. 80-742 (license contracts); FCC CC Docket No. 80-53 and No. 19129 (Phase II) (Bell System procurement practices); H.R. 12323, 94th Cong., 2d Sess. (1976); H.R. 13015, 95th Cong., 2d Sess. (1978); H.R. 3333, 96th Cong., 1st Sess. (1979); S. 611, 96th Cong., 1st Sess. (1979); S. 622, 96th Cong., 1st Sess. (1979); H.R. 6121, 96th Cong., 1st Sess. (1979); S. 2827, 96th Cong., 2d Sess. (1980); S. 898, 97th Cong., 1st Sess. (1981); H.R. 5158, 97th Cong., 1st Sess. (1981).

competitive businesses (which would assure that the divested companies and the industry would not be plagued with these same disputes). Because AT&T would not own the local bottlenecks that permitted unfair competitive advantages, the proposed Decree did not impose comparable restrictions on AT&T other than to prohibit it from reacquiring any of the BOCs. Finally, the proposed decree eliminated all the restrictions in the 1956 Judgment—which would have threatened the interests of the divested BOCs as well as those of the post-divestiture AT&T and Western Electric. *See* Petition, p. 3.[3]

5. The District Court conducted extensive public proceedings to determine whether the proposed decree was "in the public interest," under the Antitrust Procedures and Penalties Act of 1974. 15 U.S.C. §§ 16(b)-(h) ("Tunney Act").

In these proceedings, Judge Greene considered and rejected each of the arguments that U S West now advances. He held that the District Court had jurisdiction under the Sherman Act to enter binding orders against each part of the Bell System enterprise and its successors-in-interest. He further held that separate representation of the divested companies was neither feasible nor necessary because the Bell System was a single unitary enterprise and AT&T had fiduciary obligations to the *same* three million shareholders that would initially own both the post-divestiture AT&T and the divested companies. App. 66a-69a; 552 F. Supp. at

[3] Contrary to U S West's assertions (p. 3), there had been a pressing need to eliminate the technologically obsolete 1956 Judgment with respect to all post-divestiture Bell entities, including the divested BOCs. Because the 1956 Judgment limited these entities to "communications services . . . the charges for which are subject to public regulation under the Communications Act of 1934," the Judgment was susceptible to an interpretation that the BOCs could not provide exchange services (*e.g.*, cellular radio or inside wiring) when they are deregulated (as they now have been). *See* 552 F. Supp. at 138 n.17 & 178 n.198. The 1982 Decree, in contrast, allows the divested BOCs to provide all exchange telecommunications services, regardless of whether they are "subject to public regulation."

220-21; *see also id.* at 201 ("both before and after [divestiture], the same shareholders maintain the same ownership interests in the same assets").

Judge Greene then proceeded to analyze the proposed Decree and each of the proposed restrictions on the BOCs. He disapproved some proposed restrictions, but concluded that so long as the divested companies owned local monopolies, the public interest required that they be prohibited from engaging in interexchange services (552 F. Supp. at 188-89), information services (*id.* at 189-90), and the manufacture of telecommunications equipment (*id.* at 190-91).[4] The Decree, with its modified restrictions on the BOCs and on AT&T, was affirmed by this Court in February, 1983. *Maryland* v. *United States,* 460 U.S. 1001 (1983).

6. Implementation of the Decree required that the predivestiture BOCs be reconfigured as seven regional firms that owned only local exchange facilities and that had sufficient assets to provide all local exchange functions independently of AT&T. Thus, before divestiture, massive resources were transferred from AT&T, Western Electric, and Bell Laboratories to the BOCs, and the interexchange facilities and customer premises equip-

[4]Judge Greene also approved a restriction on the BOCs' participation in any businesses other than local telephone service, the provision of customer premises equipment, and directory advertising, but established a liberal procedure for waivers of this restriction. Decree, Section VIII(C), App. 83a; *see* 552 F. Supp. at 195 n.267. At the same time, he held that the BOCs would become parties to the Decree upon divestiture (*see* Decree, Section VII, App. 82a-83a), and that they may obtain relief from the core line of business restrictions if and when the local exchanges lose their natural monopoly characteristics, and he noted that the United States will make reports to the Court regarding the continuing appropriateness of the line of business restrictions every three years. 552 F. Supp. at 194-95.

On February 2, 1987, the Department of Justice filed a report with the District Court that described its view of current competitive conditions and its tentative recommendations on modifications of the line of business restrictions. Judge Greene has established a schedule for the submission of public comments on the Department's report, so this matter is now before the District Court.

ment of the predivestiture BOCs were, in turn, transferred to AT&T. The divestiture of U S West and the six other regional companies, representing 75 percent of the assets of the Bell System, occurred on January 1, 1984.

7. Since divestiture, U S West has exercised its rights under Section VII of the Decree by filing over fifteen separate motions for waivers of the Decree's line of business restrictions (*see* p. 7 n.4, *supra*), thus acknowledging that it is bound by the obligations of the Decree. U S West has also challenged the District Court's *interpretations* of the Decree's line of business restrictions. *See* Petition, pp. 11-12. However, the brief that U S West filed in the Court of Appeals in April, 1986, marked the first time that U S West (or any of the divested companies) had argued to any court that the injunctive provisions of the Decree cannot be enforced against its BOCs. After U S West's Brief was filed, other divested regional companies expressly disavowed U S West's contentions. *See, e.g.*, Tr. of Oral Argument, p. 19 (May 16, 1986).

The Court of Appeals also flatly rejected U S West's contentions, calling them "remarkable" and "specious." App. 8a-9a. It dismissed the Due Process claim on the ground that U S West and its subsidiaries "were wholly owned subsidiaries of AT&T at the time the consent decree was entered," and that it is "self-evident" that a parent company can "bind its wholly owned subsidiaries without affording them independent legal representation." App. 8a-9a. The Court of Appeals similarly rejected U S West's "equitable" claims, concluding that the only "fiduciary duty" owed by AT&T was to the three million shareholders who owned all the Bell System's assets and that AT&T would not have breached that duty even if U S West were correct that AT&T agreed to restrictions on U S West "in order to free [AT&T]." App. 9a. The Court of Appeals further recognized that U S West was wrong in asserting that the latter was the objective of the Decree. App. 11a.

REASONS FOR DENYING THE WRIT

There is no reason or basis for review of the Court of Appeals's holding that Judge Greene had jurisdiction in 1982 to enter binding orders against all the successors-in-interest to the Bell System's assets and that Judge Greene need not (and could not) have provided them with independent representation before entering the Decree. This holding does not conflict with any decision of this Court or of any court. To the contrary, it is U S West's arguments that depart from settled law.

The overriding fact is that the Bell System was a single unitary enterprise, and AT&T appeared in the antitrust proceeding on behalf of the entire system, including the exchange monopolies assigned to U S West at divestiture. AT&T then represented the interests of the over three million shareholders who owned the system and who unquestionably had the right to reconfigure its assets. Thus, the Court of Appeals simply applied the established and commonsense proposition that a corporation and its wholly-owned subsidiaries are a single enterprise, and that an antitrust court has *in personam* jurisdiction over all assets of a corporate defendant (including its wholly-owned subsidiaries), regardless of where they are located—and has plenary authority to bind the successors-in-interest to those assets.[5]

If the law were otherwise, no divestiture decree, whether litigated or entered by consent, could be enforced against the firms created by a divestiture. That would be peculiarly ironic here, because under U S West's theory, it would recreate the very com-

[5]*See, e.g., Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977); *Pennoyer* v. *Neff*, 95 U.S. 714, 723 (1878). *See also Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). Indeed, it is only because Judge Greene had this jurisdiction that he was able to direct the reconfiguration of the predivestiture BOCs as seven self-sufficient companies that owned only local exchange monopolies and to order their divestiture in that form from AT&T. *See* p. 7, *supra*. Thus, by acknowledging Judge Greene's jurisdiction to order the divestiture (Petition, p. i), U S West is acknowledging the Court's jurisdiction over the divested entities and the Court's authority to impose binding restrictions on them.

bination of monopoly and competitive businesses that the Decree sought to end. That would defeat the antitrust remedy that the Justice Department sought and secured in 35 years of antitrust litigation.

1. Under these circumstances, it is not surprising that the Court of Appeals decision does not conflict with the decision of any other court. The decisions that U S West cites are all irrelevant. U S West relies on *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964), a case that holds only that a consent judgment cannot be entered in a government antitrust suit when one party has not consented to its provisions; here, in contrast, AT&T as the parent company of the Bell System consented to the Decree on behalf of the entire System. *Hansberry* v. *Lee*, 311 U.S. 32, 42-45 (1940), and *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 691-93 (1961), are similarly irrelevant. Each discusses the power of a party to a case to bind *unaffiliated* firms. Here, the Decree applies to firms that were wholly-owned subsidiaries of AT&T when the Decree was entered and that became separate corporations that were subject to the restrictions only when they were divested to the same shareholders that owned the Bell System, pursuant to the very Decree that U S West now challenges. *See* App. 9a.[6]

Similarly, none of U S West's citations even permits an argument that AT&T could have breached a fiduciary duty to U S West by consenting to the antitrust relief that the Department of Justice had sought for over three decades. To the contrary, *Pepper* v. *Litton*, 308 U.S. 295, 306 (1939) (cited by U S West, Peti-

[6]U S West miscites *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969). That case does not hold that there is no "privity" between a parent corporation and its wholly-owned subsidiary. Rather, it holds that the determination whether a parent corporation is bound by its subsidiary's conduct must be made in a proceeding in which the court has jurisdiction over the parent corporation. Here, in contrast, the parent corporation *was* a party; the court had jurisdiction over all its assets (including its interests in wholly-owned subsidiaries), and the parent company agreed to bind the entire Bell System.

tion, p. 19), refutes U S West's claim.[7] It teaches that corporate fiduciaries owe duties to those with economic interests in the corporation: that is, its shareholders, bondholders, and creditors. As the Court of Appeals held, AT&T's fiduciary obligations were to the Bell System's over three million owners, *not* to AT&T's wholly-owned subsidiaries or to specific Bell System assets.

2. In this regard, the character of AT&T's fiduciary obligation to its shareholders refutes U S West's assertions (Petition, p. 17) that the Decree could have been "negotiated" to advance the "corporate interests" of the post-divestiture AT&T "at the expense of those of the BOCs." Preliminarily, the Decree was not "negotiated" in the usual sense; AT&T consented to the Department's *precise* proposed remedy because it was the only way to

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[7]U S West's remaining citations are mystifying. *FTC* v. *Exxon Corp.*, 636 F.2d 1336 (D.C. Cir. 1980), is another decision by the Court of Appeals that held against U S West's claim. That case does not hold that a wholly-owned subsidiary is entitled to separate representation in an antitrust case. There, Exxon was permitted to acquire a company, subject to a court order to "hold" it "separate" during the FTC proceedings that would determine whether the acquisition violated the antitrust laws. The Court allowed Exxon to represent both its and its wholly-owned subsidiary's interests during the FTC proceeding and recognized that the Exxon subsidiary indisputably *would* be bound by the final order. *Id.* at 1342. The only purpose of the "hold separate" order was to protect the subsidiary's trade secrets and other confidential information from disclosure to Exxon until it was decided whether the integration of the Drives Group and Exxon would be lawful. Here, in contrast, there was no basis for even a hold separate order because the to-be-divested portions of the BOCs had been parts of the integrated Bell System for 100 years. *See* 552 F. Supp. at 220-21.

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), is also irrelevant. There, this Court held only that divestiture was required when the Court had earlier held that this remedy was mandated by Section 7 of the Clayton Act. It was undisputed that the divested entities would be bound by the decree. Indeed, there the Justice Department had "reluctantly acceded" to a lesser remedy. *Id.* at 137-38. Here, in contrast, the Department obtained the precise relief that it had sought in decades of litigation.

end the incessant antitrust and competitive controversies that were crippling the Bell System and threatening its shareholders. More fundamentally, because the divested companies represented $115 billion of the Bell System's $150 billion in assets, AT&T's fiduciary obligation to the Bell System shareholders required AT&T to assure that local monopolies were divested in financially sound condition and with adequate resources to pursue their businesses—as each was.

Indeed, the sole basis for U S West's argument that the divested companies' interests were sacrificed is that the post-divestiture AT&T was freed from most Decree restrictions, whereas the divested companies were not. This argument ignores the antitrust basis for the Decree. With the divestiture of the local monopolies, there was no basis for restricting the competitive portions of the Bell System that were assigned to AT&T. But it does not follow that the post-divestiture AT&T (which has no monopoly revenues and which has experienced disappointing financial returns) is better off than the post-divestiture BOCs (which have monopoly revenues and which have been financially successful beyond all expectations). It simply reflects that different antitrust obligations attached to the former Bell System's bottleneck monopolies than to its competitive assets.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

U S WEST, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

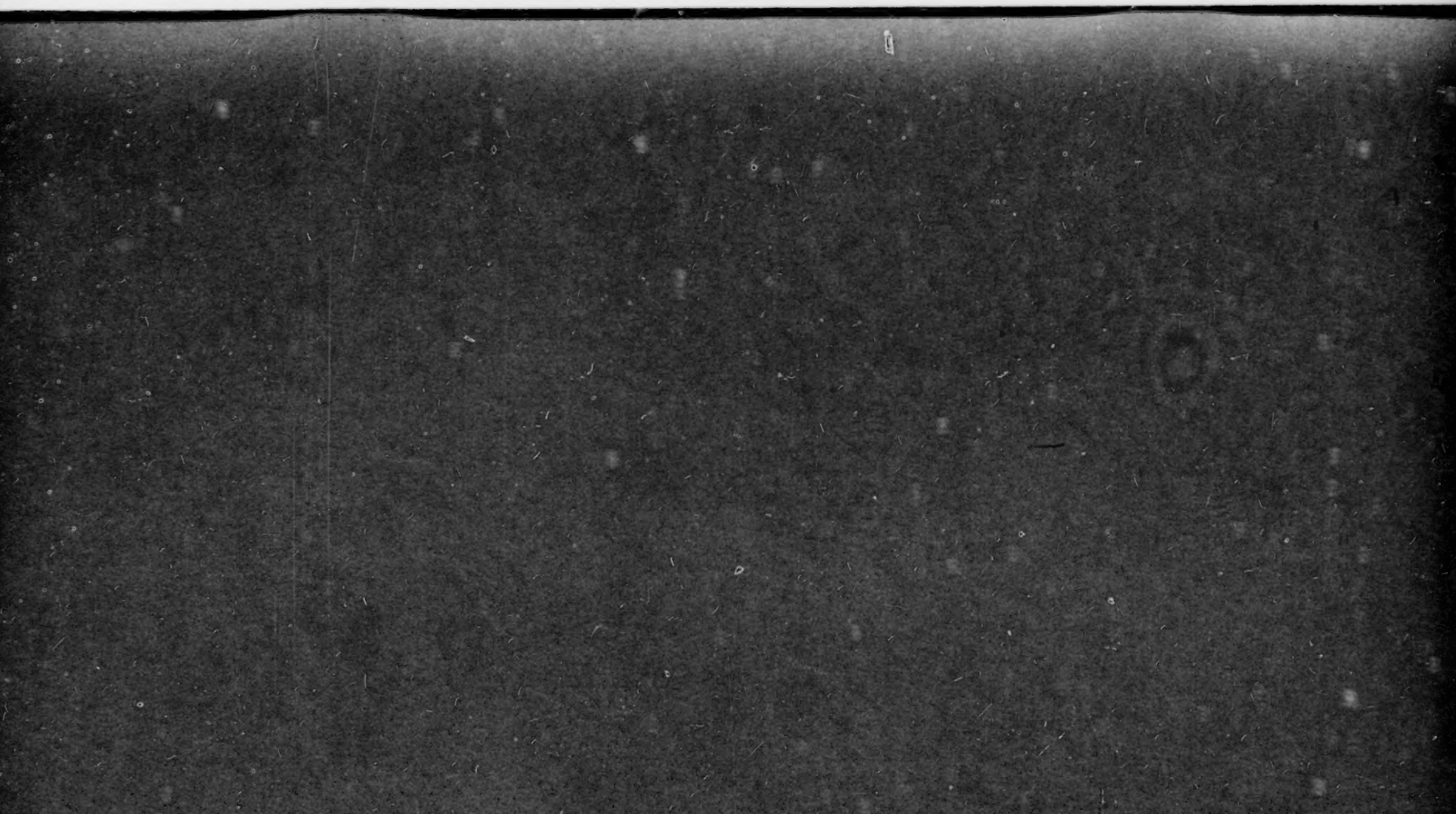
On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT MCI COMMUNICATIONS CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a divested company that accepted the economic benefits resulting from the divestiture decree is estopped from challenging structural protections against anticompetitive conduct that are an integral part of that court-approved remedy?

2. Whether a parent corporation may represent and bind its wholly-owned subsidiaries to injunctive provisions in a divestiture decree without violating traditional fiduciary principles or the Due Process Clause?

RULE 28.1 STATEMENT

MCI Communications Corporation has no parent corporation, no subsidiaries other than wholly owned subsidiaries, and no affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-776

U S WEST, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT MCI COMMUNICATIONS CORPORATION IN OPPOSITION

This case involves the enforceability of injunctive provisions contained in the consent decree that ended the antitrust suit brought by the United States against the American Telephone and Telegraph Company ("AT&T"). The injunction prohibits the divested local Bell telephone companies from participating in business activities where control of the local telephone network would give them unfair competitive advantages.

A participant in the proceedings below,[1] MCI has a strong interest in preserving the integrity of the divesti-

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[1] The district court granted MCI leave to intervene in the appeal below. *United States v. Western Electric Co.*, slip op. (D.D.C. March 20, 1986).

ture decree and its injunctive restrictions. MCI is the second-largest interstate long-distance carrier and the victim of years of the Bell System's monopoly abuse which the consent decree was intended to end. *See, e.g., MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1139-60 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *United States v. AT&T*, 524 F. Supp. 1336, 1352-57 (D.D.C. 1981).

STATEMENT OF THE CASE

Until implementation of the consent decree in the government's antitrust case against AT&T, AT&T controlled the provision of telephone services and equipment in the United States. AT&T achieved this dominance through the Bell System, a vertically integrated enterprise that included AT&T's Long Lines Division, the dominant long-distance company, and the Bell Operating Companies (or "BOCs"), wholly owned subsidiaries that provided monopoly local telephone service in virtually every major American city.

In 1974, the United States filed a lawsuit, known as the *AT&T* case, to require AT&T to divest the local Bell companies. In 1982, the Justice Department concisely summarized the theory of that suit:

> as a rate base/rate of return regulated monoplist, AT&T has had both the incentive and the ability, through cross-subsidization and discriminatory actions, to leverage the power it enjoys in its regulated monopoly markets to foreclose or impede competition in related, potentially competitive markets. The linchpin of AT&T's monopoly power . . . was its ownership and control, through the BOCs, of regulated local exchange monopolies . . . .

Response of the United States to Public Comments on Proposed Modification of Final Judgment, *United States v. Western Electric Co.*, 47 Fed. Reg. 23320, 23335 (1982) [hereafter "Response"].

The *AT&T* case came to trial in 1981. In January 1982, after the district court had heard "well over ninety percent of the parties' evidence both quantitatively and qualitatively," (*United States v. AT&T*, 552 F. Supp. 131, 152 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983)), the Government and the Bell System announced a proposed settlement subject to judicial approval.[2]

The Line of Business Restrictions

The "central remedial mechanism of the decree" was divestiture and, as its "necessary complement," the injunction prohibiting the local Bell companies from anticompetitively expanding beyond their local telephone monopolies into other lines of business.[3] As the Justice Department told the district court, Bell System anticompetitive abuses had not "thus far proven amenable to successful regulatory solution," so "permitting BOC entry into competitive markets would undermine the rationale [of] divestiture." Response, 47 Fed. Reg. at 23336; *see United States v. Western Electric Co.*, 592 F. Supp. 846, 855 n.20 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985). The Government ex-

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[2] The proposed settlement was presented as an agreed "modification" of the 1956 decree settling an earlier antitrust case brought by the Government against the Bell System, *United States v. Western Electric Co.*, Civil Action No. 17-49 (D.N.J., filed Jan. 14, 1949). *See* 552 F. Supp. at 140-41 and 144 & n.51. This is the origin of the term "Modification of Final Judgment" or "MFJ." Later decisions of the district court are therefore captioned *United States v. Western Electric Co.*

[3] Response, 47 Fed. Reg. at 23336, 23323. Section II(D) of the judgment prohibits the local Bell companies from providing interexchange telecommunications services or information services, manufacturing telecommunications equipment, or providing any other product or service (other than exchange communications, marketing of customer premises equipment, and directory advertising) that is not a natural monopoly service actually regulated by tariff. Pet. App. 4a-5a.

plained (Response, 47 Fed. Reg. at 23335) why divestiture without the injunctive restrictions would not provide effective relief:

> Absent the modification's restrictions on BOC lines of business, the BOCs would have the very same incentives and ability to foreclose or impede competition in related markets. Thus, given the BOCs' continuing status as regulated monopolies, the modification's line-of-business restrictions are intended to ensure, consistent with the obligations of this Court, "that there remain no practices likely to result in monopolization in the future."

The district court extensively reviewed the proposed settlement under the Tunney Act, 15 U.S.C. § 16(b)-(h). Over 600 corporations (including MCI), associations, individuals, and federal and state governments and agencies filed over 8,000 pages of commentary on the proposed settlement. *United States v. Western Electric Co.*, slip op. at 1 (D.D.C. May 25, 1982). At the conclusion of the comment period, the district court requested additional briefing and oral argument on specific topics, including whether the injunction prohibiting other business activities was in the public interest.

On August 24, 1982, after reviewing a variety of comments both supporting and opposing the injunctive restrictions, the district court concluded that the restrictions were necessary to prevent the reoccurrence of anticompetitive conduct. 552 F. Supp. at 186-91 (citing *Ford Motor Co. v. United States*, 405 U.S. 562, 577-78 (1972)). The court did, however, modify the proposed restrictions to include a provision (Section VIII(C), *reprinted in* 552 F. Supp. at 231) for waiving the restrictions if and when a local Bell company could demonstrate it no longer had the ability to impede competition in a particular line of business.

Representational Issues

The district court also requested briefing on whether the local Bell companies could or should "have a direct voice in the present proceedings." *United States v. Western Electric Co.*, slip op. at 14 (D.D.C. May 25, 1982). In response, AT&T acknowledged its duty to protect its shareholders' interests in all Bell System assets: "AT&T and the current [local Bell companies] are all segments of a single enterprise owned by a body of shareholders whose interests in Bell System assets AT&T is duty-bound to protect." AT&T Brief in Response to the Court's Memorandum of May 25, 1982, at 108 (filed June 14, 1982). The Justice Department agreed that the local Bell companies did not require separate representation because AT&T acted as their voice in the proceedings. Brief of the United States in Response to the Court's Memorandum of May 25, 1982, at 89 (filed June 14, 1982). Other commenters argued that separate representation was necessary. *United States v. AT&T*, 552 F. Supp. at 220.

The district court ultimately rejected (*id.* at 221) the suggestions for representation on the grounds that AT&T had an enforceable responsibility and a tangible economic interest in protecting all its shareholders. The court also recognized (*id.*) that the local Bell companies had only limited ability to add to the factual and legal arguments made by others, and the court could identify no procedural mechanism that would permit the still-integrated entities to make a contribution to the Tunney Act process.[4]

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[4] *Id.* at 221-22. After judicial approval of the decree imposed a legal obligation to divest, the district court heard testimony on the proposed plan for reorganization of the Bell System from three designated chief executive officers of the holding companies of the to-be-divested local Bell companies, *United States v. Western Electric Co.*, 569 F. Supp. 1057, 1062 & n.4 (D.D.C.), *aff'd mem. sub nom. California v. United States*, 464 U.S. 1013 (1983), and

U S West Accepts the Economic Benefits of The Consent Decree

On January 1, 1984, AT&T divested its holdings in the local Bell companies and transferred their shares to seven newly created regional Bell holding companies (or "RHCs"). Petitioner U S West, one of the regional Bell companies, thereby acquired three local Bell companies. The assets that U S West obtained divestiture were then worth over fifteen billion dollars (*1984 U S West Annual Report*), and have now increased in value to more than seventeen billion dollars (*1985 U S West Annual Report*). In addition, the consent decree assigned (552 F. Supp. at 191-94) directory services to U S West and permitted U S West to market telephones, PBXs, and other types of advanced consumer telecommunications equipment. In 1985, U S West earned over seven billion in revenues (*1985 U S West Annual Report*). U S West has achieved sizable and consistent growth in revenue and profits despite overall losses in the numerous lines of business that it has entered pursuant to court-approved waivers. *See* National Regulatory Research Institute, *Unregulated Enterprises of the Bell Regional Holding Companies*, at 94 (March 1986) ("none of U S West's new subsidiaries are profitable").

U S West acknowledges (Pet. 11-12) that it made no claim until mid-1984 that it and its wholly owned local Bell companies were free to ignore the injunctive provisions of the consent decree. No other regional or local Bell company has made this argument.[5] U S West has

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those holding companies submitted briefs and motions on a range of topics.

[5] At least two regional Bell companies, BellSouth and NYNEX, specifically reject this argument. BellSouth Motion For Leave to Appear As Amicus Curiae, at 1, *United States v. Western Electric Co.* (filed April 1, 1986, D.C. Cir.) ("BellSouth and its subsidiaries are bound by the terms of the AT&T consent decree"); NYNEX Motion For Leave to Appear As Amicus Curiae, at 1, *United States*

acted inconsistently with its present position by seeking substantial additional opportunities through the waiver process in the decree. The district court has granted U S West's requests to enter such lines of business as cellular radio in the Gulf of Mexico, financial services, and provision of vehicle and equipment fleet services.[6]

The Proceedings Below

U S West appealed the district court's denial of certain motions seeking to "clarify" certain aspects of the judgment.[7] The court of appeals rejected (Pet. App. 8a-11a) U.S. West's arguments that it was not bound by the injunctive provisions of the decree. U S West's claim that it was not independently represented failed "because it ignores the facts that AT&T was a party to the antitrust proceeding and both the RHCs and the BOCs were wholly owned subsidiaries of AT&T at the time the consent decree was entered" (Pet. App. 8a-9a). That court found it "self-evident" (Pet. App. 9a) that a parent may bind its wholly owned subsidiaries without affording them independent legal representation. The court held "both specious and irrelevant" (Pet. App. 9a) U S West's contention that AT&T breached a fiduciary duty owed to the local Bell companies by consenting to the line-of-business restrictions.

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v. Western Electric Co. (filed April 1, 1986, D.C. Cir.) ("NYNEX and its subsidiaries are subject to the terms of the AT&T consent decree").

[6] *United States v. Western Electric Co.*, 604 F. Supp. 256, 263-64 (D.D.C. 1984); *United States v. Western Electric Co.*, slip op. (D.D.C. Aug. 22, 1985); *United States v. Western Electric Co.*, slip op. (D.D.C. Feb. 28, 1986).

[7] Pet. App. 5a-6a & n.3. As the court of appeals acknowledged, U S West raised before the district court, in at best an oblique fashion, the argument presented to this Court in its petition. Pet. App. 8a n.4.

ARGUMENT

Petitioner Is Estopped From Challenging The Obligations Of A Decree The Benefits Of Which It Has Already Accepted

With overtones of an action seeking a remedy for wrongful life of unexpected offspring, petitioner challenges an integral part of the compromise settlement that gave it independent existence. The challenge comes only after U S West's voluntary acceptance of billions of dollars in assets, as well as its frequent invocation of decree-based rights to obtain waivers from decree restrictions.

Unsurprisingly, petitioner (Pet. 24) claims that it is "not arguing here that the divestiture itself was unlawful or should be reversed," but instead seeks only to void the "injunctive provisions" which are petitioner's sole decree obligations. Yet the removal of these restrictions would undermine the essential "rationale of divestiture" and leave the local Bell companies "the very same incentives and ability to foreclose or impede competition in related markets." *See* Response, 47 Fed. Reg. at 23335 (*see* pages 3-4 above). Indeed, the judge administering the consent decree reiterated (Pet. App. 25a) that without these structural limits "the result of the breakup would have been to exchange one nationwide monopoly with the incentive and ability to exploit monopoly power and injure competition for several smaller monopolies with the identical incentives and abilities." Elimination would, as a practical matter, nullify divestiture and make the sometimes wrenching changes that divestiture entailed a pointless exercise.

The consent decree brought to an end decades of turmoil within the telecommunications industry and imposed structural solutions to persistent antitrust abuses which could not otherwise be successfully addressed. *See* Response, 47 Fed. Reg. at 13336-37 (*see* page 3 above). One of the major beneficiaries of that resolution was petitioner,

which gained valuable assets and the other benefits of a monopoly franchise. Having amassed assets of almost 20 billion dollars and taken in billions more in revenues from monopoly franchises bestowed on it by the decree, petitioner now seeks to avoid its concomitant obligations. This is preeminently a circumstance in which public policy requires that a party not "be allowed to attack an officially approved condition of . . . [a court order] while retaining at the same time all of its benefits." *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 502 (1955).

AT&T's Wholly-Owned Subsidiaries Were Properly Bound by the Injunctive Provisions of the Divestiture Decree

As U S West acknowledges (Pet. 24), AT&T as sole shareholder and owner of the local Bell companies had "lawful privity" which entitled it to dispose of its subsidiaries' assets. The court below correctly held (Pet. App. 9a) that "[t]his intimate corporate affiliation" also allowed the parent to bind its subsidiary to injunctive restrictions upon the use of its assets. *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870 (5th Cir. 1984). This traditional rule that complete corporate ownership produces privity also enables a plaintiff to sue a corporate parent and obtain injunctive relief against all of its wholly-owned subsidiaries. *See Computer Searching Service Corp. v. Ryan*, 439 F.2d 6, 9 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). Abrogation of this rule would have several serious consequences: litigation of divestiture cases would become substantially more complicated; negotiation of consent decrees involving divestiture would be seriously hampered; and the enforceability of outstanding decrees would be called into question.

As a typical application of the settled principle that "under the antitrust laws, corporations and their wholly-owned subsidiaries function as a single enterprise" (Pet. App. 11a, citing *Copperweld Corp. v. Independence Tube*

Corp., 467 U.S. 752 (1984)), the decision below creates no conflict requiring resolution by this Court. Petitioner relies (Pet. 19-21) on *Pepper v. Litton*, 308 U.S. 295 (1939), for the wholly irrelevant fiduciary principle that contracts between dominant stockholders and a corporation must be at arms-length so that profit will not be secured at the expense of minority stockholders. Divestiture gave the stockholders of AT&T stock in U S West and the other regional Bell companies as well, and no suggestion has been made that any portion of those stockholders who owned both AT&T and the local Bell companies before and after divestiture were disadvantaged by the Modified Final Judgment. Indeed, by removing restrictions in another decree binding the Bell System since 1956 (Pet. 3), the consent decree expanded the lines of business that entities owned by Bell shareholders could enter.

Nor is due process violated by unitary pre-divestiture representation merely because of anticipated post-divestiture conflicts. Neither of the two cases cited by petitioner (Pet. 24-25) purports to establish a due process right of separate representation whenever the interests of parents and subsidiaries might be expected to diverge after entry of a divestiture decree.[8] If as petitioner as-

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[8] In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 136 (1967), this Court suggested that a subsidiary of El Paso be permitted to renegotiate unfavorable contracts negotiated by the parent, but only because the Supreme Court had earlier ordered that the subsidiary be "restored to a position where it could compete with El Paso in the California market" and because the Court had serious concerns about non-compliance with its mandate. No similar consideration exists here. In *FTC v. Exxon Corp.*, 636 F.2d 1336, 1342 (D.C. Cir. 1980), the court of appeals affirmed a district court order that a division of a wholly-owned but newly-acquired subsidiary should have counsel independent from its parent, but only because complete separation of the parent from the subsidiary pursuant to a hold-separate order in an FTC challenge to the acquisition was necessary "to ensure that any divestiture later ordered would not be a hollow remedy." Here, the integration of parent and subsidiary had lasted a century.

serts (Pet. 23) "the interests of AT&T and the BOCs diverged," that "divergence" did not occur at least until the divestiture decree was approved.[9] AT&T was therefore entitled to represent its shareholders throughout the Tunney Act proceedings and to bind its wholly-owned subsidiaries to beneficial agreements.

CONCLUSION

The petition for a writ of certiorari should be denied.

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February 13, 1987

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[9] Even though the district court had only limited authority to reject or modify the terms of the proposed decree (*United States v. AT&T*, 552 F. Supp. at 151), not even U S West suggests that local Bell companies were entitled to separate representation before the proposed decree was submitted to the district court.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF U S WEST, INC. IN SUPPORT OF THE PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-776

U S WEST, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA

and

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF U S WEST, INC. IN SUPPORT OF THE PETITION

Petitioner U S WEST, Inc. ("U S WEST") hereby addresses certain arguments first raised in the oppositions filed by the Department of Justice ("Department"), the American Telephone and Telegraph Company ("AT&T") and MCI Communications Corporation ("MCI") to U S WEST's Petition for a Writ of Certiorari filed November 13, 1986. U S WEST seeks certiorari on the important question of whether, consistent with traditional notions of due process, a parent company may bind its to-be-divested subsidiaries to competitive restrictions as part of a negotiated settlement of an antitrust suit where (1) the agreed-to restrictions prohibited otherwise lawful business activity after divesti-

ture from the parent; (2) the subsidiaries were non-parties to the lawsuit and were not provided with separate representation allowing address of the restrictions; and (3) the parent could not properly represent the post-divestiture interests of the subsidiaries under well-established concepts of privity because of a fundamental conflict of interest.

The responses of AT&T and the Department raise several new matters which underscore the important jurisdictional and due process issues raised by this case. We briefly address several of these issues.

AT&T contends that a District Court must be empowered to impose prospective restrictions on non-party divested subsidiaries because a Court would otherwise lack jurisdiction to enforce divestiture decrees against the firms created by divestiture.[1] However, a District Court's power to effectuate a divestiture is quite different than whether a decree can be enforced against unrepresented entities. We submit that the scope of the District Court's authority to "enforce" a consent decree against unrepresented parties is obviously a matter of jurisdictional consequence worthy of review.

Furthermore, AT&T's contention that the District Court needs the authority to bind non-party subsidiaries to post-divestiture business restrictions in order to effectuate divestiture decrees is not borne out by a review of the case law. *No* published case could be found where a District Court approved a parent company's agreement to post-divestiture business restrictions on behalf of the

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[1] AT&T Opposition at 9. It should be noted that MCI appears to disagree with AT&T's assertion about the expanse of the District Court's powers in stating that "the district court had only limited authority to reject or modify the terms of the proposed decree (*United States v. AT&T*, 552 F. Supp. at 151). . . ." MCI Opposition at 11 n.9.

to-be-divested subsidiaries—far less one where the restrictions inured to the direct competitive benefit of the antitrust defendant. In fact, the only "continuing restriction" divestiture cases found involved agreement by parents to certain injunctive restrictions on their *own* activities.[2]

Obviously, a parent company, as a named party and full participant in a law suit, can agree to restrictions on itself as part of a settlement. Important jurisdictional issues are implicated, however, where the parent attempts to bind the business operations of its to-be-divested subsidiaries in a manner which precludes them from competing with their former parent. It is for this reason that a unity of interest sufficient to establish legal privity for the purpose of binding the subsidiaries to post-divestiture business restrictions was not present.

Lastly, the Department recognizes that AT&T owed a fiduciary duty to the future shareholders of the to-be-divested companies.[3] While U S West has framed this duty in terms of the corporate entity itself, the fact that the interests of the pre- and post-divestiture shareholders would necessarily diverge places the Department's position very close to the position taken by Petitioner. Recognition of a duty flowing to the shareholders of the to-be-divested companies raises serious questions about whether AT&T, as a fiduciary, could agree to the "continuing restrictions" given traditional privity analysis which requires an alignment of interests.[4] Put another way, the issue of whether the parent company could properly represent the post-divestiture interests of its former subsidiaries regarding matters in which there

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[2] *See, e.g., Ford Motor Co. v. United States*, 405 U.S. 562 (1972); *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981).

[3] Department Opposition at 9; 10 n.10.

[4] *See* U S WEST Petition at 22.

was an inherent conflict raises serious due process concerns.[5]

For the foregoing reasons, as well as those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] MCI also contends that because U S WEST has accepted the benefits of divestiture, it is estopped from challenging the decree. MCI Opposition at 8. As explained in our petition, however, having been denied independent representation and/or party status, the operating companies were at the mercy of AT&T. In fact, the decree negotiated by AT&T and the Department expressly precluded any independent action by the operating companies until divestiture had been effectuated. *See* U S WEST Petition at 11. Subsequent to divestiture, U S WEST has tried a variety of means to raise the issues addressed here. *Id.* at 11-12.